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AN ESSAY
ON
THE RATIONALE OF
CIRCUMSTANTIAL EVIDENCE;
ILLUSTRATED BY NUMEROUS CASES.

BY
WILLIAM WILLS,
ATTORNEY-AT-LAW.

"It is not likely that so many beams of light should issue from the chambers of heaven for no other purpose but to lead us into a precipice. Probable arguments and prudential motives are the great hinges of human actions."—*Jeremy Taylor*.

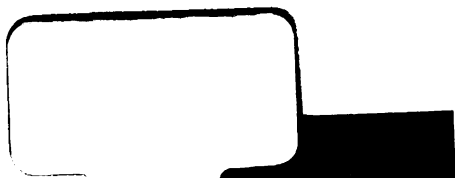
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PREFACE.

THE most important doctrines of Circumstantial Evidence have been so ably treated of in the learned works of Mr. Bentham and Mr. Sergeant Starkie, that an apology may be thought necessary for this publication. It will however be perceived, that the design of the following Essay is different in some important particulars from that of either of the above-mentioned authors ; and that an attempt has been made to illustrate the subject by the application of many instructive cases, some of which have been compiled from original documents, and others from publications not easily accessible.

It has not always been practicable to support the statement of cases by reference to books of recognised authority, or of an equal degree of credit ; but discrimination has uniformly been



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their deficiencies, I am also not without the hope that they may be in some degree serviceable to others. At any rate this Essay will be considerably received by those who rightly estimate the importance of the subject, and the difficulties of such an attempt.

I cannot conclude without expressing my great obligation to several valued friends for much useful information, and for many judicious suggestions in the progress of this work; nor without adding that I shall be thankful for the friendly notice of any errors or misconceptions into which I may have fallen, and for the communication of any information which may throw light upon this attractive subject.

W. W.

Edgbaston, near Birmingham,
February, 1838.

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THE RATIONALE OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER I. EVIDENCE IN GENERAL.

SECTION 1.

THE NATURE OF EVIDENCE.

IT will greatly conduce to the formation of clear and correct notions on the subject of Circumstantial Evidence, to take a brief introductory view of the nature of evidence in general, of some of its various kinds, and of the nature of the assurance which each of them is calculated to produce.

The great object of all intellectual research is the discovery of TRUTH, which may be defined to

be the conformity of words, ideas, and relations with the nature and reality of events and things.

The JUDGMENT is that faculty of the mind which is principally concerned in the investigation and acquisition of truth ; and its exercise is the intellectual act by which one thing is perceived and affirmed of another, or the reverse.

Every conclusion of the judgment, whatever may be its subject, is the result of EVIDENCE,—a word which (derived from words in the dead languages signifying to see, to know,) by a natural transition is applied to denote the *means* by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

The term PROOF is often confounded with that of evidence, and applied to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence. When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of inquiry, such event or proposition is said to be *proved* ; and, according to the nature of the evidence on which such conclusion is grounded, it is either known or believed to be true*. Our judgments then are the consequence

* Whately's Logic, b. iv. ch. iii. s. i.

of proof ; and proof is that quantity of appropriate evidence which produces assurance and certainty ; and evidence therefore differs from proof, as cause from effect.

It is unnecessary, in relation to the subject of this section, to mention the inferior degrees of assurance, which will be more appropriately noticed in another place.

SECTION 2.

THE VARIOUS KINDS OF EVIDENCE.

TRUTH is either abstract and necessary, or probable and contingent ; and each of these kinds of truth is discoverable by appropriate, but necessarily different kinds of evidence. This classification, however, is not founded in any essential difference in the nature of truths themselves, and has reference merely to our imperfect capacity and ability of perceiving them ; since to an Infinite Intelligence nothing which is the object of knowledge can be probable, and everything must be perceived absolutely and really as it is*.

In many instances the correspondence of our ideas with realities is perceived instantaneously, in which cases the judgment is said to be INTUI-

* Butler's Analogy, &c., Introd.

TIVE, from a word signifying to look at ; and the evidence on which it is founded is also denominated intuitive ; though it would perhaps be more correct to use that word as descriptive of the nature of the mental operation, rather than of the kind of evidence on which it rests.

INTUITION is the foundation of DEMONSTRATION, which consists of a series of steps severally resolvable into some intuitive truth. Demonstration concerns only necessary and immutable truth* ; and its first principles are definitions, which exclude all ambiguities of language, and lead to infallibly certain conclusions†.

But wide as is the range of the human intellect, the subjects which admit of the certainty of intuition and demonstration are comparatively few. Innumerable truths, the knowledge of which is indispensable to happiness, if not to existence, depend upon evidence of a totally different kind, and admit of no other guide than our own consciousness or the testimony of our fellow-men.

The subjects of evidence of these latter kinds

* Kirwan's Logic, part iii. ch. 2. Crombie's Natural Theology, vol. i. p. 348.

† Stewart's Elements of the Philosophy of the Human Mind, vol. ii. ch. ii. s. 3.

are questions of fact or of actual existence, which, as they are not of a necessary nature, may or may not have existed, without involving any contradiction, and as to which our reasonings and deductions may be erroneous. Such evidence is sometimes called HISTORICAL, but more generally MORAL EVIDENCE ; probably because its principal application is to subjects directly or remotely connected with moral conduct and relations*.

Of the various kinds of moral evidence, that of TESTIMONY is the most comprehensive and important in its relation to human concerns ; so extensive is its application, that to enter on the subject of testimony at large, would be to treat of the conduct of the understanding in relation to the greater portion of human affairs. The design of this essay is limited to the consideration of some of the principal rules and doctrines peculiar to circumstantial evidence as applicable to criminal jurisprudence,—one of the leading heads under which philosophical and juridical writers consider the subject of testimonial evidence. Nor is it proposed to treat of *documentary* circumstantial evidence ; a subject which, however interesting in itself, is applicable prin-

* Gambier's Introduction to the Study of Moral Evidence, p. 1. (ed. 3.) Crombie's Natural Theology, vol. i. pp. 348, 354.



6 NATURE OF THE ASSURANCE PRODUCED

cipally to discussions upon the genuineness of historical and other writings ; and such cases of this description as occasionally happen in the concerns of common life are referable to general principles, which equally apply to circumstantial evidence of every kind.

Considering how many of our most momentous determinations are grounded upon circumstantial evidence, and how important it is that they should be correctly formed, the subject is one of deep interest and moment. It would be most erroneous to conclude that, because it is illustrated principally by forensic occurrences, it especially concerns the business or the members of a particular profession. Such *events* are amongst the most interesting occurrences of social life ; the *subject* relates to an intellectual process, called into exercise in almost every branch of human speculation and research.

SECTION 3.

THE NATURE OF THE ASSURANCE PRODUCED BY DIFFERENT KINDS OF EVIDENCE.

In investigations of every kind it is essential that a correct estimate be made of the kind

and degree of assurance of which the subject admits.

Since the evidence of DEMONSTRATION relates to necessary truths, (as to which the supposition of the contrary involves not merely what is not and cannot be true, but what is also absurd,) and since MORAL EVIDENCE is the basis of contingent or probable truth merely, it follows that the convictions which these various kinds of evidence are calculated to produce must be of very different natures. In the former case absolute CERTITUDE is the result ; to which MORAL CERTAINTY, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior.

Unlike the assent which is the inevitable result of mathematical reasoning, BELIEF in the truth of events may be of various degrees, from moral certainty, the highest, to that of mere probability, the lowest ; between which extremes there are innumerable degrees and shades of conviction, which the latency of mental operations and the unavoidable imperfections of language render it impossible to define or express. In subjects of moral science the want of appropriate words, and the occasional application of the same word to denote different things, have given occasion to

much obscurity and confusion both of idea and expression ; of which a remarkable exemplification is presented in the words probability and certainty.

The general meaning of the word PROBABILITY is likeness or similarity to some other truth, event, or thing*. Sometimes the word probability is used to express the preponderance of the evidence or arguments, in favour of the existence of a particular event or truth, or adverse to it ; and sometimes as assertive of the abstract and intrinsic credibility of a fact or event.

In its former sense probability is applied as well to certain mathematical subjects, as to questions dependent upon moral evidence.

In a mathematical sense, probability is the ratio of favourable cases to all the possible cases by which an event may happen or fail ; and it is represented by a fraction, the numerator of which is the number of favourable cases, and the denominator the whole number of possible cases, certainty being represented by unity. If the number of chances for the happening of the event be $= 0$, and the event be consequently impossible, the expression will be $= 0$; and so if the number

* Butler's Analogy, Introd. Locke's Essay concerning Human Understanding, b. iv. ch. xv.

of chances of the failure of the event be $= 0$, and the event be therefore certain, the expression will also be $= 0$. If $m + n$ be the whole number of cases, m the favourable and n the unfavourable ones, the probability of the event is $m : m + n$. It follows, that if there be an equality of chances for the happening or the failing of an event, the fraction expressive of the probability is $= \frac{1}{2}$, the mean between certainty and impossibility*; and probability therefore includes the whole range between those extremes.

The terms CERTAINTY and PROBABILITY are however essentially different in meaning as applied to moral evidence, from what they import in a mathematical sense; inasmuch as the elements of moral certainty and moral probability, notwithstanding the ingenious arguments which have been urged to the contrary, appear to be incapable of numerical expression, and because it is not possible to assign all the chances for or against the occurrence of any particular event†.

The expression MORAL PROBABILITY, though

* Kirwan's Logic, part iii. ch. vii. s. 1.; and Dr. Matthew Young, on the Force of Testimony in establishing facts contrary to Analogy, (Transactions of the Irish Academy, vol. vii. p. 79.)

† Ibid.

liable to objection on account of its deficiency in precision, is for want of one more definite and appropriate, of frequent and necessary use ; nor will its application lead to mistake, if it be remembered, that it expresses only the preponderance of probability, resulting from the comparison and estimate of *moral* evidence, and that if it were capable of being expressed with exactness, it would lose its essential characteristic and possess the certainty of demonstration.

The preceding strictures equally apply to the expression MORAL CERTAINTY, which must be understood not as importing deficiency in the proof, but only as descriptive of the kind of certainty which is attainable by means of moral evidence ; and it is that degree of assurance which induces a man of sound mind to act without doubt upon the conclusions to which it leads*.

It has been justly and powerfully remarked by a noble and learned writer, that “ the degree of excellence and of strength to which testimony may rise seems almost indefinite. There is hardly any cogency which it is not capable by possible supposition of attaining. The endless multiplication of witnesses—the unbounded variety of

* Stewart's Elements, vol. ii. ch. ii. s. 4. Encyclopædia Brit., art. METAPHYSICS.

their habits of thinking, their prejudices, their interests,—afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us*.” But if evidence leave reasonable ground for doubt, the conclusion cannot be morally certain, however great may be the preponderance of probability in its favour.

Some mathematical writers have propounded numerical fractions for expressing moral certainty; which, as might have been expected, have been of very different values. But the nature of the subject precludes the possibility of reducing to the form of arithmetical notation the subtle, shifting and evanescent elements of moral assurance, or of bringing to quantitative comparison things so inherently different as certainty and probability.

Other writers have given, in a more general manner, mathematical form to moral reasonings and judgments; but it is questionable if they have produced any useful result, however they may have shown the ingenuity of their au-

* Lord Brougham’s Discourse on Natural Theology, p. 251.

thors *. Though it be true that some very important deductions from the doctrine of chances are applicable to events dependent upon the duration of human life, such as the expectation and the decrement of life, the law of mortality, the value of annuities and other contingencies, and also to reasoning in the abstract upon particular cases of testimonial evidence†, yet it is obvious, that all such conclusions depend upon circumstances, which, notwithstanding that to the superficial and unreflecting observer they appear casual, uncertain, and irreducible to principle, unlike moral facts and reasonings in general, are really based upon and deducible from numerical elements‡.

A learned writer, whose opinions, in despite of his numerous eccentricities of matter and of style, have exercised great influence in awakening the spirit of judicial reformation, and are destined to exercise still more auspicious influences, asks§,

* See Kirwan's *Logic*, part iii. ch. vii. s. 21. Whately's *Logic*, b. iv. ch. ii. s. 1.

† Whately's *Logic*, b. iv. ch. ii. s. 1.

‡ See the Tract on Probability published by the Society for the Diffusion of Useful Knowledge.

§ Bentham's *Traité des Preuves Judiciaires*, b. i. ch. xvii., and *Rationale of Judicial Evidence*, b. i. ch. vi. s. 1. Sir James Mackintosh's *Discourse on the Progress of Ethical Philosophy*, p. 290.

“ Does justice require less precision than chemistry ?” The truth is, that the precision attainable in the one case is of a nature of which the other does not admit. It would be absurd to require the proof of an historic event, by the same kind of evidence and reasoning as that which establishes the equality of triangles upon equal bases and between the same parallels, or that the *latus rectum* in an ellipse is a third proportional to the major and minor axes.

This conscript father of legal reforms* has himself supplied a memorable illustration of the futility of his own inquiry. He has proposed a scale for measuring the degrees of belief, with a positive and a negative side, each divided into ten degrees, respectively affirming and denying the same fact, zero denoting the absence of belief ; and the witness is to be asked what degree expresses his belief most correctly. With his characteristic ardour the venerable author gravely argues that this instrument could be employed without confusion, difficulty, or inconvenience †. But MAN must become wiser and better before the mass of his species can be entrusted with the use of such a moral gauge, from which the un-

* Hoffman's Course of Legal Study, vol. i. p. 364.

† Bentham's Rationale of Judicial Evidence, b. i. ch. vi. s. 1.

assuming and the wise would shrink, while it would be eagerly grasped by the conceited, the interested, and the bold*.

But though a process strictly mathematical cannot be applied to estimate the effect of moral evidence, a proceeding somewhat analogous is observed in the examination of a group of facts adduced as grounds for inferring the existence of some other fact. Although an *exact* value cannot be assigned to the testimonial evidence for or against a matter of disputed fact, the separate testimony of each of the witnesses has nevertheless a determinate *relative* value, depending upon considerations which it would be foreign to the present subject to enumerate. On one side of the equation are mentally collected all the facts and circumstances which have an affirmative value; and on the other, all those which either lead to an opposite inference, or tend to diminish the weight or to show the non-relevancy of all or any of the circumstances which have been put into the opposite scale. The value of each separate portion of the evidence is separately estimated, and, as in algebraic addition, the opposite quantities,

* See a scale of testimonial credibility in Kirwan's *Logic*, part iii. ch. vii. s. 21.

positive and negative, are united, and the *balance* of probabilities is what remains as the ground of human belief and judgment.

Probability, as hitherto considered, denotes the ratio of the chances of the happening to those of the failure of a particular event, as deduced from the consideration of the *evidence* for and against it; but, as already intimated, there is another sense in which it is often used, and in which it denotes CREDIBILITY OF INTERNAL PROBABILITY, and expresses our judgment of the accordance or similarity of events with which we become acquainted through the medium of testimony, with facts previously known by experience*.

The results of EXPERIENCE are, expressly or impliedly, assumed as the standard of credibility in all questions dependent upon moral evidence. By means of the senses and of our own consciousness we become acquainted with external nature, and with the characteristics and properties of physical things and moral beings, which are then made the subjects of memory, reflection, and other intellectual operations; and ultimately the inferences and observations to which they lead

* Abercrombie's *Inquiries concerning the Intellectual Powers and the Investigation of Truth*, part ii. s. 3.

are reduced to general principles, and become the basis and standard of comparison in similar circumstances*. The groundwork of our reasoning is our confidence in the permanence of the order of nature, and in the existence of moral causes, which operate with an unvarying uniformity, not inferior to, and perhaps surpassing even, the stability of physical laws; though, relatively to our feeble and limited powers of observation and comprehension, and on account of the latency, subtlety, and fugitiveness of mental operations, and of the infinite diversities of individual men, there is apparently more of uncertainty and confusion in moral than in material phænomena†.

Experience comprehends, not merely the facts and deductions of personal observation, but the observations of mankind at large of every age and country‡. It would be absurd to disbelieve and reject as incredible the relations of events, because such events have not occurred within the range of individual experience. We may remember the unreasonable incredulity of the

* Whately's Logic, b. iv. ch. ii. s. 4. and ch. iii. s. 1.

† Hampden's Lectures introductory to the study of Moral Philosophy, p. 150. Whately's Logic, ch. iv. s. 4. Abercrombie's Philosophy of the Moral Feelings, Preliminary Observations, s. ii.

‡ Kirwan's Logic, part iii. ch. vi. s. 3.

king of Siam, who, when the Dutch ambassador told him that in his country the water in cold weather became so hard that men walked upon it, and that it would even bear an elephant, replied, "Hitherto I have believed the strange things you have told me, because I look upon you as a sober fair man, but now I am sure you lie*."

By experience we are led to refer facts or events of the same character to causes of the same kind ; by ANALOGY facts and events similar in some, but not in all of their particulars to other facts and occurrences, are concluded to have been produced by a similar cause : so that analogy vastly exceeds in its range the limits of experience in its widest latitude, though their boundaries may sometimes be coincident and sometimes undistinguishable. It has been profoundly remarked that "in whatever manner the province of experience, strictly so called, comes to be thus enlarged, it is perfectly manifest that, without some such provision for this purpose, the principles of our constitution would not have been duly adjusted to the scene in which we have to act. Were we not so formed as eagerly to seize

* Locke's *Essay on the Human Understanding*, b. iv. ch. xv. s. 5.

the resembling features of different things and different events, and to extend our conclusions from the individual to the species, life would elapse before we had acquired the first rudiments of that knowledge which is essential to our animal existence*.” Every branch of knowledge presents instructive examples of the extent to which this mode of reasoning may be securely carried. The scientific observer, from the inspection of shapeless fragments, which have mouldered under the suns and storms of ages, constructs a model of the original in its primitive magnificence and symmetry. A profound knowledge of comparative anatomy enabled the immortal Cuvier, from a single fossil bone, to describe the structure and habits of many of the extinct animals of the antediluvian world. “The least prominence of the bone,” says that great man, “has a determined character, relative to the class, the order, the genus, and even the species to which it belongs; so that by scrutinizing the extremity of a well-preserved bone, and applying analogical skill and close comparison, all these things may be determined as certainly as if we had the whole animal†.” So an enlightened knowledge

* Stewart’s Elements, vol. ii. ch. ii. s. iv.

† Discourse on the Revolutions of the Surface of the Globe.

of human nature often enables us, on the foundation of apparently slight circumstances, to follow the tortuous windings of crime, and ultimately to discover its guilty author, as infallibly as the hunter is conducted by the track to his game.

The following pertinent and instructive observations, from the pen of the late enlightened and liberal professor of moral philosophy in the University of Oxford, may advantageously close this part of our subject, comprehending as they do everything which can be usefully adduced in illustration of the necessity and value of the principle of analogy. "In all reasonings concerning human life, we are obliged to depend on analogy, if it were only from that uncertainty, and almost suspension of judgment, with which we must hold our conclusions. We can seldom obtain that number of instances which is requisite here to establish an inference indisputably. The conduct of persons or of parties may have been attended by certain antecedents and certain results in the examples before us ; still the state of the case may be owing, not so much to that conduct, as to other causes, which are shut out of our view, when our attention is fixed on the particular examples adduced for the purpose of the inference. We must thus be strictly on our guard against

transferring to other cases, anything merely contingent and peculiar to the instances on which our reasoning is founded. And this is what analogical reasoning requires and enables us to do. If rightly pursued, it is employed, at once, both in generalizing and discriminating ; in the acute perception at once of points of agreement and points of difference. The acmé of the philosophical power is displayed in the perfect cooperation of these two opposite proceedings. We must study to combine in such a way as not to merge real differences ; and so to distinguish as not to divert the eye from the real correspondence*.”

It may be objected, that the minds of men are so differently constituted, and so much influenced by differences of culture, that the same evidence may produce very different degrees of belief ; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that scepticism and credulity are modifications of the same principle, and that to a certain extent this objection is grounded in fact ; but, nevertheless, the psychological considerations which it involves have but little alliance with the

* Hampden's Lectures introductory to the study of Moral Philosophy, p. 178.

present subject ; the argument, if pushed to its extreme, would go to introduce universal doubt and distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions ; but in the one case, as well as in the other, there is a general agreement and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, not what may be the possible effect of evidence upon minds *peculiarly* constructed, but what ought to be its fair result with men, such as the generality of civilized men are.

It is of no moment, in relation to criminal jurisprudence, that exact expression cannot be given to the inferior degrees of belief. The doctrine of chances, and nice calculations of probabilities, cannot, except in a few cases, and then only in a very general and abstract way, be applied to human actions, which are essentially unlike, and dependent upon peculiarities of persons and circumstances which render it impossible to assign to them a precise value, or to compare them with a common numeral standard ; nor are they capable in any degree, or under any circumstances,

of being applied to actions which infer legal responsibility. In the common affairs of life men are frequently obliged, from necessity and duty, to act upon the lowest degree of belief; and, as Mr. Locke justly observes, "He that will not stir, till he infallibly knows the business he goes about will succeed, will have little else to do but to sit still and perish*." But in such cases our judgments commonly concern ourselves, and our own motives, duties and interests; while in the administration of penal justice, the magistrate is called upon to apply to the conduct of *others* a rule of action applicable to a given state of *facts*, where external and sometimes ambiguous indicia alone constitute the grounds of judgment. In the application of every such rule the certainty of the facts is presupposed, and is its only foundation and vindication; and upon any lower degree of assurance its application would be arbitrary and indefensible†.

* Essay on the Human Understanding, b. iv. ch. xiv. s. 1.

† Mascardus De Probationibus, vol. iii. Conclusio MCCXXVIII. 9.

CHAPTER II.

CIRCUMSTANTIAL EVIDENCE IN GENERAL.

SECTION 1.ESSENTIAL CHARACTERISTICS OF CIRCUMSTANTIAL
EVIDENCE.

THE epithets **DIRECT** and **INDIRECT** or **CIRCUMSTANTIAL**, as applied to testimonial evidence, have been sanctioned by such long and general use, that it might appear presumptuous to question their accuracy, as it would perhaps be impracticable to substitute others more appropriate. But assuredly these terms have frequently been very indiscriminately applied, and the misuse of them has occasionally been the cause of lamentable results ; it is therefore essential accurately to discriminate their proper application.

On a superficial view, direct and indirect or circumstantial would appear to be *distinct* species of evidence ; whereas these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature

identically the same with direct evidence ; the distinction is, that by **DIRECT EVIDENCE** is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum* ; **CIRCUMSTANTIAL EVIDENCE** is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred. A fact of this kind is therefore called *factum probans*. A witness deposes that he saw A. inflict on B. a wound, of which he instantly died ; this is a case of direct evidence. B. dies of poisoning ; A. is proved to have had malice against him and to have purchased poison, wrapped in a particular paper, the paper is found in his secret drawer, and the poison gone. The *evidence* of these facts is *direct* ; the facts themselves are *indirect* and circumstantial, as applicable to the inquiry whether a murder has been committed, and whether it was committed by A.

So rapid are our intellectual processes, that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment, and the train of reasoning of which it is the result ; and the one appears to succeed the

other instantaneously by a kind of necessity, as the thunder follows the flash. This fact obtains most commonly in respect of matters which have been frequently the objects of mental association.

In matters of direct testimony, if we give credence to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially *deductive* and *inferential*. There is no apparent necessary connection between the facts and the deduction; the *facts* may be true and the *deduction* erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

The term **PRESUMPTIVE** is frequently used as synonymous with circumstantial **EVIDENCE**; but it is not so used with strict accuracy. The word presumption, *ex vi termini*, imports an *inference* from facts; and the adjunct presumptive, as applied to evidentiary facts, assumes the certainty of the relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts

may be indisputable, and yet their relation to the principal fact may be only apparent and not real ; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence therefore differ as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove ; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*.

SECTION 2.

PRESUMPTIONS, NATURAL AND LEGAL.

It is essential to a just view of our subject that our notions of the nature of PRESUMPTIONS be precise and distinct. A PRESUMPTION is a probable consequence, drawn from facts (either certain, or proved by direct testimony,) by which may be determined the truth of a fact alleged, but of which there is no direct proof*.

* Le Marchant's Report of the proceedings in the House of Lords on the claims to the Barony of Gardner, p. 436.

The word presumption, therefore, inherently imports a conclusion of the judgment ; and it is applied to denote such facts or moral phænomena as from experience we know to be invariably or commonly connected with some other related fact. A wounded and bleeding body is discovered ; it has been plundered ; wide and deep footmarks are found in a direction proceeding from the body ; or a person is seen running from the spot. In the one case are observed marks of flight, in the other is seen the fugitive, and we know that guilt naturally endeavours to escape detection. These circumstances therefore induce the presumption that crime has been committed, and the presumption is a conclusion or consequence from the circumstances. The antecedent circumstances are therefore one thing, the presumption from them another and different one. Of presumptions afforded by moral phænomena a memorable instance is recorded in the judgment of Solomon, whose knowledge of the all-powerful force of maternal love supplied him with an infallible criterion of truth*. So when Aristippus, who had been cast away on an unknown shore, saw certain geometrical figures traced in the sand, his inference that the country

* Domat's Civil Law, &c., b. iii. tit. 6.

was inhabited by people conversant with mathematics was a presumption of the same nature*.

All presumptions connected with human conduct are inferences founded upon the observation of man's nature as a sentient being and a moral agent ; and they are necessarily infinite in variety and number, differing according to the diversities of individual character and to the innumerable and ever-changing situations and emergencies in which men are placed. Hence the importance of a knowledge of the instincts, affections, desires, and moral capabilities of our nature, to the correct deduction of such presumptions as are founded upon them, and which are therefore called **NATURAL PRESUMPTIONS**†.

LEGAL PRESUMPTIONS are founded upon natural presumptions, being such natural presumptions as are connected with human actions, so far as they fall within the province and jurisdiction of the legislator and the magistrate ; and they are divisible into two classes,—as they relate to civil rights, and as they relate to actions which infer penal responsibility.

In matters of property, the principal modifications of which are matters of positive institu-

* Gambier's *Introd. to the study of Moral Evidence*, p. 55.

† Mascardus *De Probationibus*, vol. iii. *Conclusio mcccxxvi.*

tion, the laws of every country have created artificial legal presumptions, grounded upon reasons of policy and convenience, to prevent social discord and to fortify private right. The justice and policy of such regulations have been thus eloquently enforced: "Civil cases regard property: now, although property itself is not, yet almost every thing concerning property, and all its modifications, is of artificial contrivance. The rules concerning it, become more positive, as connected with positive institutions. The legislator therefore always, the jurist frequently, may ordain certain methods, by which alone they will suffer such matters to be known and established; because, their very essence, for the greater part, depends on the arbitrary conventions of men. Men act on them with all the power of a creator over his creatures. They make fictions of law and presumptions of law (*præsumptiones juris et de jure*) according to their ideas of utility—and against those fictions, and against presumptions so created, they do and may reject all evidence*."

But in penal jurisprudence, man as a phy-

* Burke's Works, vol. ii. p. 623. (Ed. 1834, printed by Holdsworth and Ball.) Mascardus De Probationibus, vol. iii. Conclusio MCCXXVIII.

sical being and a moral agent, such as he is by natural constitution and by the influences of social condition, is the subject of inquiry. Punitive justice is applied to injurious actions proceeding from malignity of purpose, and not to physical actions merely. It has been said with great force and accuracy that “where the subject is of a physical nature, or of a moral nature, independent of their conventions, men have no other reasonable authority, than to register and digest the results of experience and observation ;” and that “the presumptions which belong to criminal cases are those natural and popular presumptions which are only observations turned into maxims, like adages and apophthegms, and are admitted (when their grounds are established) in the place of proof, where better is wanting, but are to be always overturned by counter proof*.” The Civilians called a presumption of this kind *præsumptio hominis*, because it was not appointed by the laws, but made by the judge from the facts judicially before him. Presumptions of every kind, to be just, must be dictated by nature and reason ; and it is impossible, without a dereliction of every rational

* Burke's Works, vol. ii. p. 623. Mascardus De Probationibus, vol. iii. Conclusio mcccxxvii.

principle, to lay down arbitrary rules of presumption, where every case must of necessity be connected with peculiarities of personal disposition and of concomitant circumstances, and be therefore irreducible to any fixed principle. In criminal jurisprudence, therefore, no arbitrary presumptions should ever be admitted; and whenever they are, they are commonly found to work injustice. It would be as unreasonable to subject human actions to unbending rules of presumption, as to prescribe to the commander of a ship inflexible rules for his conduct, without any principle of discretion in the unforeseen and innumerable accidents and contingencies of the tempest and the ocean.

It is impossible to recall without horror the sanguinary law* which made the concealment of the death of an illegitimate child by its mother conclusive evidence of murder; whereas in truth it affords not even the slightest presumption to warrant such a conclusion, since it is more natural and more just to attribute the suppression to a desire to conceal female shame and to escape open dishonour. Numerous collateral considerations unite to show the cruelty and injustice of this particular presumption. A profound wri-

* Stat. 21 Jac. I. c. 27.

ter on criminal jurisprudence observes, with unanswerable arguments of humanity and justice, that "it is not every crime in which the extreme of violence is committed, that ought to be visited with capital punishment. An instance of this, recognised by the laws of all civilized nations, is manslaughter; and we would that we could add (so far at least as this country is concerned) infanticide; a crime wanting in all the attributes which distinguish the murder of adults, viz. the wickedness of the motive, the danger to the community, the feeling of alarm and insecurity which it occasions—reasons by which all people are unconsciously swayed when a young woman is indicted for this offence, and which render trials for child-murder little more than solemn contrivances for decorously avoiding the harsh and impolitic enactments of the law*." To the disgrace of our country this savage law has been but recently expunged from the statute books; but it should be known, that it was of foreign importation, and suggested by a corresponding edict of Henry II. of France†.

* Whately on Secondary Punishments, p. 108, Appendix No. 2; see also Dr. William Hunter's tract on the uncertainty of the signs of murder in the case of bastard children.

† See Domat, b. iii. tit. 6.

Obnoxious enactments of a similar nature, revolting to every sense of justice, are still in force ; witness the statutory provision* which makes the possession of a forged bank-note, without lawful excuse, knowing the same to be forged, a transportable felony, and expressly casts the onus of the proof of such excuse upon the party accused. When a peremptory presumption of legal guilt is not pernicious and unjust, it is at least needless ; for if it be a fair presumption of reason, it will be adopted by the tribunals without the mandate of the legislature : and the conclusion is more likely to be just, when adopted in each particular case, after fair and candid consideration of all attendant circumstances. In the instance under review, a man might innocently though knowingly possess a forged bank-note, without having it in his power to prove a lawful excuse (as that he had found it, or taken it in payment) ; his known character for probity might place him in the opinion of his fellow-citizens beyond the reach of suspicion, and yet his conviction be inevitable, if the dictates of justice and humanity did not

* Stat. 11 Geo. IV. and 1 Will. IV. c. 66. s. 12., which applies the same rule to many other offences connected with bank-paper.

induce jurors to disregard so unjust a rule. By a wise ordination the feelings of our nature indignantly rebel against barbarous enactments like those which have been mentioned, and tend to render them inoperative and innocuous.

As evidentiary circumstances and their combinations are infinitely varied, so also are the presumptions to which they lead ; and a complete enumeration would in either case be impracticable. The writers on the civil law have made a comprehensive and instructive collection of facts and inferential conclusions, in relation to a vast number of actions connected with legal accountability. But many things advanced by those laborious authors have relation to a state of society, and to legal institutions and modes of procedure, wholly dissimilar from our own. Our law admits of no such thing as the *semi-plena probatio*, founded on circumstances of conjecture and suspicion only, which in many countries governed by the Roman law were held to warrant the infliction of torture with a view to compel admissions and complete the proof. Hence the total inapplicability with us of the subdivisions of *indicia*, *adminicula*, *conjecturæ*, *dubia*, and *suspiciones*, which are found in the writers of other countries whose jurisprudence is founded

upon that of Rome,—subdivisions which appear to be arbitrary, vague, and useless. But it is manifest that, under legal institutions which admitted of compulsory self-accusation, in order to complete proof insufficient and inconclusive in itself, and where the laws were administered by a single judge, without the salutary restraints of publicity and popular observation, an accurate and elaborate record of the multitudinous actions and occurrences which had been submitted to the criminal tribunals operated as important limitations upon the tyranny and inconstancy of judicial discretion.

By our law the truth of every accusation is ascertained by the verdict of a jury, upon the circumstances and intrinsic and independent merits of each particular case, unfettered by obligatory and inflexible legal presumptions. The object of such unbending presumptions is to constitute legal indications of the criminality of intention, in which consists the essence of legal guilt; but their inexpediency and inefficacy for that purpose have been exposed with equal force and elegance by the hand of a master. “The connection of the intention and the circumstances is plainly of such a nature as more to depend on the sagacity of the observer, than on the excel-

lence of any rule. The pains taken by the civilians on that subject, have not been very fruitful ; and the English law writers have, perhaps, as wisely, in a manner abandoned the pursuit. In truth, it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence*.”

Attempts have been made, but with no useful result, to classify presumptions under terms expressive of their effect†. Some juridical writers have divided presumptions into VIOLENT OR NECESSARY, PROBABLE and SLIGHT‡. But this arrangement is specious and fanciful rather than practical and real ; for it is impossible thus to classify more than a few of the infinite variety of circumstances connected with human actions and motives ; and the terms of designation, from the inherent imperfections of language, although not wholly destitute of utility, are unavoidably defective in precision. We can therefore only usefully apply these epithets as relative terms : and the effect of particular facts must of necessity depend upon a variety of considerations peculiar to each individual case, and can no more be

* Burke's Works, vol. ii. p. 623.

† Bentham's Rationale of Judicial Evidence, b. 1. ch. vi.

‡ Coke on Litt. 6. b. Blackstone's Comm. vol. iv. p. 353.

predicated than the boundaries can be defined of the separate colours which form the solar bow.

SECTION 3.

RELATIVE VALUE OF DIRECT AND INDIRECT OR CIRCUMSTANTIAL EVIDENCE.

The foregoing observations naturally lead to a comparison of the relative value of Direct and Indirect or Circumstantial Evidence ; an inquiry which becomes the more necessary, on account of some novel and questionable doctrines which have received countenance even from the judgment-seat.

The best writers, ancient and modern, on the subject of evidence have concurred in treating circumstantial as inferior in cogency and effect to direct evidence ; a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence*. But language of a

* Menochius De Præsumptionibus, lib. 1. quest. 1. 6. Mascardus De Probationibus, vol. i. quest. 8. n. 8. Burnett's Treatise on various branches of the Criminal Law of Scotland, p. 506. Starkie on the Law of Evidence, vol. i. pp. 515, 521. (2nd ed.) The Theory of Presumptive Proof; or an Inquiry into the Nature of Circumstantial Evidence, including an examination of the evidence on the Trial of Captain Donellan.

directly contrary import has been so often used of late, by authorities of no mean note, as to have become almost proverbial.

It has been said that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither*." "Circumstances," says Paley, "cannot lie†." It is astonishing that sophisms like these should have passed current without animadversion. The "circumstances" are assumed to be in every case established, beyond the possibility of mistake; and it is implied, that a circumstance established, to be true, possesses some *mysterious force* peculiar to facts of a certain class. Now a circumstance is neither more nor less than a minor fact; and it may be admitted of all facts, that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that "circumstances are inflexible proofs," but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked, that circumstances and facts of every kind must

* Burnett on the Criminal Law of Scotland, p. 523.

† Principles of Moral and Political Philosophy, b. vi. ch. ix.

be proved by human testimony ; that although "circumstances cannot lie," the narrators of them may ; and that, like witnesses of all other facts, they may be biassed or mistaken. So far then circumstantial possesses no advantage over direct evidence.

A distinguished statesman and orator has advanced in unqualified terms the proposition, supported he alleges by the learned, that "when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof*." Archdeacon Paley has said, with more of caution, that "a concurrence of well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords†." Mr. Baron Legge, in charging the jury upon the trial of Miss Blandy for the murder of her father by poison‡, said, that where "a violent presumption necessarily arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, *because facts cannot lie.*"

* Burke's Works, vol. ii. p. 624.

† Principles of Moral and Political Philosophy, b. vi. ch. ix.

‡ State Trials, vol. xviii. p. 1187.

Mr. Justice Buller, in his charge to the jury in Captain Donellan's case, declared, "that a presumption which necessarily arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part if not all of those circumstances*."

It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not fairly state the question, but implies a fallacy, and that extreme cases have been selected for the illustration and support of a general position. "A presumption which *necessarily* arises from circumstances" cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as *necessarily* to produce

* The Trial of John Donellan, Esq. for the wilful murder of Sir Theodosius Edward Allesley Boughton, Bart. at the Assize at Warwick, on Friday, March 30th, 1781, taken in shorthand by Joseph Gurney.

certainty and conviction, it matters not by what *kind* of evidence the effect is produced ; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief ; nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot, in any case, be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake.

Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the *anno-domini* water-mark usually contained in the fabric of writing-paper ; and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind have recently occurred) that issues of paper have taken place bearing the water-mark of the year succeeding that of its distribution,—a striking exemplification of the fallacy of some of the arguments which have

been remarked upon. How often has it been iterated in such cases, that circumstances are inflexible facts, and that facts cannot lie!

Nor ought these several kinds of evidence to be placed in contrast, since they are not mutually opposed; for evidence of a circumstantial and secondary nature can never be justifiably resorted to except where evidence of a direct and therefore of a superior nature is unattainable.

The argument founded upon the abundance of the circumstances, and the consequent opportunities of contradiction which they afford, belongs to another part of the subject. While each of these incidents adds greatly to the probative force of circumstantial evidence in *particular cases*, they have clearly no connection with an inquiry into the value of circumstantial evidence in *the abstract*. However numerous may be the independent circumstances to which the witnesses depose, the result cannot be of a different kind from, or superior to, that strong moral assurance which is the consequence of satisfactory proof by direct testimony, and for which, if such proof be attainable, every tribunal, every reasonable mind would reject any attempt to substitute indirect or circumstantial evidence, as inadmissible,

and as affording the strongest reason for suspicion and disbelief.

It has been said, that "though in most cases of circumstantial evidence there be a *possibility* that the prisoner may be innocent, the same often holds in cases of direct proof, where witnesses may err as to identity of person, or corruptly falsify, for reasons that are at the time unknown*." This observation is unquestionably true. Even the testimony of the senses, though it afford the safest ground of moral assurance, cannot be implicitly depended upon. Sir Thomas Davenant, an eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But it was proved by the most conclusive evidence, that the men on trial were, at the time of the robbery, at so remote a distance from where Sir Thomas was robbed that the thing was impossible. The consequence was, that the men were acquitted, and some time afterwards the robbers were taken, and the articles stolen from Sir Thomas and his lady found upon them. Sir Thomas, on seeing these men, candidly acknowledged his

* Burnett on the Criminal Law of Scotland, p. 524.

mistake, and it is said gave a recompense to the persons he prosecuted, and who so narrowly escaped conviction*. It is probable that Sir Thomas was deceived by the broad glare of sunlight, but there can be no doubt of the sincerity of his impressions.

Many similar instances are upon record of the fallibility of human testimony, even as to matters supposed to be grounded upon the clearest evidence of the senses, and where the misconception related to the substantive matters of judicial inquiry: but instead of establishing the superior efficacy of circumstantial evidence, they seem irresistibly to lead to the conclusion that it is, *à fortiori*, more probable that similar misconception may take place as to *collateral* facts and incidents, to which perhaps particular attention may not have been excited. Of the truth of this observation some striking illustrations will occur in another part of this essay.

It may be objected that the foregoing observations tend to create distrust in all human testimony. While it must be admitted that the senses cannot be implicitly depended upon, it is certain that their liability to mistake may be

* *Rex v. Thomas Wood and George Brown: State Trials*, vol. xxviii. p. 819. Annual Register for 1784.

greatly diminished by habits of accurate observation and relation. The general conformity of our impressions to truth and nature, and the universal opinion and practice of mankind, establish the reasonableness and propriety of our general faith in testimonial evidence. The interest to which all controverted matters of fact give occasion is a manifestation of the preference in the human mind of truth to falsehood ; and finally, the number of mistaken inferences from the testimony of the senses is inconceivably small, as compared with the almost infinite number of judgments which are correctly drawn from evidence of the kind in question.

SECTION 4.

OF THE PROPER SUBJECTS OF CIRCUMSTANTIAL EVIDENCE.

In the present state of knowledge there can be little danger of mistake as to the legitimate subjects of human belief : but how melancholy is the degradation of the human intellect exhibited in the records of imposture and delusion, of enthusiasm and credulity, of judicial darkness and cruelty, in the pages of our own history, as well as in those of every other nation !

The Inquisition within the space of 150 years burnt 30,000 witches, and in a few years 900 men and women suffered in Lorraine for the same cause*. Sir Matthew Hale, upon the trial of Rose Cullender and Amy Duny for witchcraft at the Assizes at Bury Saint Edmund's in 1685, told the Jury "that there were such creatures as witches he made no doubt at all," and he left the case to them, with his prayer that "the great God of Heaven would direct their hearts in that weighty thing they had in hand†." The learned Sir Thomas Browne, one of the first physicians and philosophers of his time, himself the author of a treatise on vulgar errors, declared himself clearly of opinion that the persons were bewitched, and the accused were convicted and executed. Still later, the polished and enlightened Blackstone was a believer in witchcraft, which did not cease to be a capital felony until the statute 9 Geo. II. c. 5, and it is still extensively credited by the vulgar‡.

* See Gray's *Hudibras*, vol. ii. p. 168 (*note*), and the authorities there cited.

† *State Trials*, vol. vi. p. 700.

‡ See the cases of Mary Bateman for the murder of Rebecca Perigo; of Elizabeth Bryant and her two daughters for assaulting Anne Burgess for suspected witchcraft; and of James Roxborough and Sarah his wife for robbery; *Celebrated Trials*,

The Japanese who witnessed in 1803 the ascent of Garnerin from St. Petersburg evinced no surprise, and being asked if they had seen anything of the same kind in Japan, answered no, but that nothing was more common among them, and the reason why they had not seen it was that the sorcerers in Japan traversed the air only during the night*.

Judge Powel is said to have presided when a woman was arraigned on a charge of witchcraft, and one of the witnesses gave evidence that the prisoner could fly. On this the judge asked the woman if it really was so: she answered in the affirmative; when the judge, with a promptitude of expression which evinced the superiority of his understanding, told her, so she might if she would, he knew of no law against it†.

So late as the year 1785 it was the custom amongst the sect of Seceders in Scotland, to read from the pulpit an annual confession of sins, national and personal, amongst which were enumerated the repeal by Parliament of "the penal

vol. vi. pp. 44, 516, 521; Hutchinson's *Historical Essay concerning Witchcraft*; and Blackstone's *Comm.* vol. iv. p. 60.

* Bentham's *Rationale of Judicial Evidence*, b. v. ch. xvi.; and *Traité des Preuves Judiciaires*, lib. viii. ch. 2.

† Brayley's *Hertfordshire* (1818), p. 201.

statutes against witches, contrary to the express law of God*.” The committee upon the bill which ended in the statute 1 Jac. I. c. 12., by which the invocation of evil spirits, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit, or taking up dead bodies from their graves, to be used in any witchcraft, sorcery, charm, or enchantment, or killing or otherwise hurting any person by such infernal arts, were made capital offences, contained twelve bishops ; and Coke was attorney-general, and Bacon a member of the House of Commons when the statute was enacted.

It was formerly a current belief, one which is often adverted to by our older poets, that a corpse would bleed in the presence of the murderer ; and the state trials contain some curious and melancholy instances of the unfavourable influence of this opinion upon the course of judicial proceedings†. It was a general notion, that a refusal to touch the corpse was a mark of conscious guilt ; the same notion still prevails among the vul-

* Arnot's Collection and Abridgment of Criminal Trials in Scotland, p. 370.

† Standsfield's case, State Trials, vol. xi. p. 1403 ; and Oke-man's case, *ibid.* vol. xiv. p. 1324.

gar, and in several recent instances the guilty homicides have appealed to the fact of their having touched the corpse to avert suspicion*. In a case in Scotland, in 1727, it was insisted upon as a strong circumstance of suspicion against the prisoner that he had refused to attend the lifting of the corpse, and it is even stated as one of the circumstances in the interlocutor of relevancy†. Traces of this notion are discoverable in the case of Houseman, Eugene Aram's companion in crime, so late as 1757, where, by a singular coincidence, some incautious expressions of disbelief in the identity of the bone he was required to handle, confirmed the supposition of his actual participation in the murder of Clark, and ultimately led to full confession. It is almost superfluous to observe that there was no other connection between the handling of the bone, and the remark that it was not the bone of the deceased, and the discovery to which it led, than the natural and involuntary one which existed in the criminal's mind, and which

* *Rex v. Benjamin Tyler and Solomon Sewell* for the murder of William Edden, at Aylesbury Spring Assizes, 1830. *Annual Register* for 1830, p. 320.

† See the case of *Howatson, Burnett* on the Criminal Law of Scotland, p. 528, and *State Trials*, vol. xiv. p. 1327.

was developed by the implied assertion of that which he knew not to be a matter of fact*.

Many eminent persons have believed in and given relations of apparitions ; which, according to a sound philosophy, may be admitted to have been undistinguishable from realities without the necessity of acquiescing in the hypothesis of a supernatural cause. So late as the year 1754, in a trial before the Court of Justiciary in Scotland, two witnesses were permitted to swear to their having seen a spirit or ghost, which they said had told them where the body was to be found, and that the accused were the murderers†.

Dreams have often been supposed to have led to the discovery of murder ; and several remarkable coincidences of this kind have happened. A philosophical mind will however discover no causation in the conjunction of events like these, nor anything more than mere sequence ; the dream being (from whatever cause) the involuntary, and therefore vivid and impressive, recurrence in sleep of thoughts more or less transient,

* The genuine account of the life and trial of Eugene Aram for the murder of Daniel Clark, etc., who was convicted at York Assizes, August 3, 1759, before the Hon. William Noel ; see also *Biographia Britannica*, article *EUGENE ARAM*.

† Burnett on the Criminal Law of Scotland, p. 529 ; and *State Trials*, vol. xiv. p. 1327.

upon which the mind has meditated and dwelt when awake.

It is a common notion that the Deity marks his detestation of the crime of murder by indications specially discriminative of the guilty individual. The poet only embodied the popular opinion when he said,

“ . . . Murder, though it have no tongue, will speak
With most miraculous organ.”

The tendency of these and of all such notions is to disturb the tranquil current of truth, and to confound distinctions in a blind and indiscriminating desire of awarding punitive vengeance. It is conclusive that the Supreme Being departs not in this instance from the general course of his administration, that so many cases have occurred of mistaken convictions and executions. The truth is, that the commission of a crime so dreadful, and so subversive of social security and happiness, creates a feeling of common danger, and a correspondingly increased anxiety and alacrity in pursuing the traces which are inseparable from every human action, and of which, from the nature of the case, the number must in general, in crimes of this description, be greater than in more indifferent and unimportant actions ; reasons which account, without

the hypothesis of supernatural interference, for the general certainty of detection and legal retribution in respect of this specific offence.

SECTION 5.

OF THE SOURCES AND CLASSIFICATION OF CIRCUMSTANTIAL EVIDENTIARY FACTS.

The mental and physical constitution of man, and his actions and relations, are the sources of those facts which constitute circumstantial evidence.

In every inquiry into the truth of any alleged fact, as to which our means of judgment are secondary facts, there must exist relations and dependencies, which are inseparable from the principal fact, and which will commonly be manifested by external appearances. No action of a rational being is indifferent or independent; and every such action must necessarily be connected with antecedent and concomitant states of mind and with external circumstances, of the actual existence of which, though it may not invariably be apparent, there can be no doubt.

A crime is an act proceeding from a wicked motive: it follows therefore that in every such

act, there must be one or more voluntary agents ; that the act must have corresponding relations to some precise moment of time and portion of space ; that there must have existed inducements to guilt, preparations for, and objects and instruments of crime ;—and that these, the means of disguise, flight, or concealment, the possession of plunder or other fruits of crime, and innumerable other particulars connected with individual conduct, and with moral, social, and physical relations, may afford materials for the determination of the judgment. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. “ All the acts of the party, all things that explain or throw light on these acts, all the acts of others relative to the affair, that come to his knowledge and may influence him ; his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences and explanations ; his looks, his speech, his silence where he was called to speak ; everything which tends to establish the connection between all these particulars ;—every circumstance, precedent, concomitant, and subsequent, become parts of circum-

stantial evidence. These are in their matter infinite, and cannot be comprehended within any rule, or brought under any classification*."

Evidentiary facts of a circumstantial nature are susceptible only of a very general arrangement, into two classes; namely, first, moral indications, afforded by the relations and language and conduct of the party; and, secondly, facts which are apparently extrinsic and mechanical and independent of moral conduct and demeanour: and each of these classes of facts may be further considered as such facts are inculpatory or exculpatory. But this division, indefinite as it is, is grounded upon the apparent rather than the real qualities of actions, and cannot be regarded as strictly accurate; since all the actions of a rational agent are prompted by motives, and are therefore really moral indications, though it be not always practicable to develop their moral relations.

* Burke's Works, vol. ii. p. 623.

CHAPTER III.

INCULPATORY CIRCUMSTANTIAL EVIDENCE.

PART I.

MORAL INDICATIONS.

ALTHOUGH, for reasons which have been explained, any enumeration of facts as invariably conjoined with authoritative presumptions would be useless and nugatory, it is important in illustration of the general principles which determine the relevancy and effect of circumstantial evidence to notice some particulars of moral conduct of frequent occurrence in courts of criminal jurisdiction, which are popularly and on that account judicially considered as leading to important and well grounded presumptions.

These circumstances may be considered under the heads of motives to crime, declarations indicative of intention, preparations for the commission of crime, possession of the fruits of crime, refusal to account for appearances of suspicion, or unsatisfactory explanations of such appearances, evidence indirectly confessional,

and the suppression, destruction, simulation, and fabrication of evidence.

SECTION 1.

MOTIVES.

As there must necessarily pre-exist a motive to every human action, it is proper to comprise in the class of moral indications, those particulars of external situation which are usually observed, under given circumstances, to operate as motives and inducements to the commission of crime, as well as such more unequivocal indications from language and conduct as directly and pointedly manifest a relation between the deed and the mind of the actor.

Motives are with relation to moral conduct what physical power is to mechanics ; and both of these kinds of impulse are equally under the influence of known laws. But in reasoning upon motives and their resulting actions, it is impracticable to obtain the same sure data as when material phænomena only are involved, since it is not possible to discover all the modifying circumstances of human conduct, or to assign with unerring certainty the true character of the motives from which they spring.

An evil motive constitutes in law as in morals the essence of guilt ; and the existence of an in-

ducing motive for the voluntary acts of a rational agent is assumed as naturally as secondary causes are concluded to exist for material phænomena. The predominant desires of the mind are invariably followed by corresponding volitions and actions. It is therefore indispensable, in the investigation of moral actions, to look at all the surrounding circumstances which connect the supposed actor with other persons and things, and may have influenced his motives.

The usual inducements to crime, are the desire of revenging real or fancied wrongs ;—of obtaining some object of desire which rightfully belongs to another ;—or of preserving reputation, either that of general character or the conventional reputation of sex or profession. Selfishness and malignity are subtle as well as importunate casuists ; and even if it were possible to enumerate all the infinite ways in which they lead to action, it would be irrelevant to do so, since the subject properly belongs to a distinct department of moral science.

It is always a satisfactory circumstance of corroboration, when in connection with convincing facts an apparently adequate motive can be assigned ; but, as the operations of the mind are invisible and intangible, it is impossible to go

further. Undue or even great stress must not be laid upon the existence of circumstances supposed to be indicative of motives ; nor ought it in any case to supersede the necessity for the same weight of proof, as would be deemed necessary in the absence of all evidence of such a stimulus. Suspicion,—too readily excited by the appearance of supposed inducements,—is incompatible with that even and unprejudiced state of mind, which is indispensable to the formation of correct and sober judgement. While true it is, that “imputation and strong circumstances. . . . lead directly to the door of truth,” it must also be borne in mind, that

“ Trifles, light as air,
Are, to the jealous, confirmations strong
As proofs of holy writ.”

To penetrate the mind of man, is totally out of human power ; and circumstances which apparently present powerful motives, may never have operated as such. Who can say, that some “uncleanly apprehensions,”—some transient thoughts of sinister aspect,—in the dimness of moral light momentarily mistaken for good, may not unbidden float across the purest mind ? And how often is it that man has no control over circumstances of apparent omnipotence over his

motives ! But notwithstanding these qualifying considerations, it is proper that in investigations grounded upon circumstantial evidence, no fact should be overlooked ; since it is impossible to predicate what may be its ultimate relevancy or effect when combined with other facts.

It must not be expected, that motives shall be discovered, which, tried by the strict rules of morality, will be regarded as adequate. It is of the essence of moral weakness, that it forms a mistaken estimate of present advantage ; and a want of correspondence and proportion will therefore of necessity be found between the objects of desire and the means employed to obtain them. The assassin's dagger may be put in requisition for a few pieces of gold ; and the difference between that and other inducements to crime, is a difference only of degree.

But the moral anatomist has to encounter other difficulties, in endeavouring to trace the connection between actions and their impelling motives. Few men will voluntarily expose themselves to the reprobation of their fellow-men by avowed contempt of the obligations of truth and duty. The desire of the approbation of others has a powerful and often an auspicious influence upon the character ; but its operation is unfavourable,

and even dangerous, whenever it becomes the leading motive of conduct*. Hence the human mind is subject to the influence of antagonist principles, and men frequently put on the semblance of characteristics of which they are entirely destitute ; the natural inclination to truth being destroyed by overpowering inducements to dissimulation.

It follows from the preceding remarks, that evidence of collateral facts which appear to present a motive for a particular act of criminality, deserve in themselves no great weight ; and perhaps they are important only as they operate to counterpoise the antecedent improbability, that the party would have committed the act in question. It must ever be remembered, that with motives merely, the legislator and the magistrate have nothing to do ; and that ACTIONS AND EXTERNAL FACTS AS THE ENDS OR OBJECTS OF MOTIVES, are the only legitimately cognizable subjects of human tribunals. Motives and their objects differ, it has been remarked, as the spring and wheels of a watch differ from the pointing of the hour, being mutually related in like manner†. But

* Stewart's Philosophy of the Active and Moral Powers of Man, vol. i. ch. vii. sect. 1.

† Hampden's Lectures on Moral Philosophy, p. 214.

when the moral spring is once put in motion, then, even a gesture or a look may be the source of encouragement and impulse to the deadliest crimes, and subject the moral actor even to the highest legal penalty*.

On the other hand, as an action without a motive would be an effect without a cause, and as the particulars of external situation and conduct will in general correctly denote the motive for a criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence.

It occasionally happens, that an action may be equally well accounted for by different motives of various degrees of malignity. Thus in the case of death occasioned by poison, it may have been administered with intention to kill, or with the intention of producing some other specific but less dangerous consequence†. A wound may have been malignantly inflicted, either with the intention of killing, or of doing some injury short of death. One of several companions in

* See the Annual Mutiny Acts; and *Rex v. the Earl of Thanet and others*, State Trials, vol. xxvii. p. 821.

† See the case of Dustergool, an Armenian lady, *Memoirs of the Life of Sir James Mackintosh*, edited by his son, Robert James Mackintosh, Esq., vol. ii. p. 112.

guilt may have proceeded to an extremity, not originally contemplated even by himself and not concurred in by the others, as in the case of murder committed to prevent resistance or discovery. In these and similar cases, it is impossible, perhaps, to assign the specific motive which led to the act, and it can be judged of only by the attendant circumstances ; but social security and substantial justice require that every man shall be held accountable for the natural and probable consequences of his actions, and no one can be permitted to speculate with impunity upon the precise extent to which he can securely carry his mischievous intentions, or to allege the agency of less guilty motives and wishes, the reality and degree of which it is alike impossible to ascertain. In the case of John Woodburne and Arundel Coke, tried at the Suffolk assizes, 1722, for lying in wait, and slitting the nose of Mr. Crisp, the brother-in-law of Coke, (an offence made capital by the stat. 22 and 23 Car. II. c. 1.) it was in vain urged that the intention was to murder, and not to maim or disfigure ; a defence which, had it been successful, would have reduced the crime to a misdemeanor*. The motive alleged was of a more aggravated kind than that

* State Trials, vol. xvi. p. 54.

which constituted the technical offence ; but the principle is the same as when a less criminal motive is alleged.

Courts of justice, of necessity, interpret by external indications the secret workings of the mind ; but as such conclusions must in general be inferential merely, they ought never to be made the subject of testimonial opinion. A serious violation of this rule occurred upon the trial of Mary Blandy in 1752, for the murder of her father, when Dr. Addington was allowed to state his opinion, that the agitation which the prisoner evinced, proceeded from no concern for her parent, but from the apprehension of unhappy consequences to herself*. Similar testimony would not now be admitted. Whenever motives are suggested as arising out of external circumstances, it is required that such circumstances shall be distinctly proved. Except in questions of science, witnesses are permitted to depose only to facts ; it is the province of the jury alone to determine as well whether those facts lead to *any* inference as to actuating motives, as also the particular character of any such conclusion.

It occasionally happens that actions of great enormity are committed, for which it is impos-

* State Trials, vol. xviii. p. 1117.

sible to discover any motive. In such cases, which are not of frequent occurrence, upon principles of reason and justice essential to common security, the actor is held to be legally accountable*, unless it be clearly and indubitably shown that he is incapable of distinguishing the moral qualities and tendencies of his actions†.

SECTION 2.

DECLARATIONS OF INTENTION.

It is not uncommon with persons about to engage in crime, to make obscure and mysterious allusion to purposes and intentions of revenge, or to boast to others, whose standard of moral conduct is the same as their own, of what they will do, or to give vent to expressions of revengeful purposes, or of malignant satisfaction at the anticipated occurrence of some serious mischief. Such declarations are of great moment, when clearly connected by independent evidence with some subsequent criminal action. The just effect of such language is to show the

* *Rex v. Philip Nicholson* for the murder of Mr. and Mrs. Bonar; *Celebrated Trials*, vol. vi. p. 125.

† See the trial of Jonathan Martin for setting fire to York Minster at the York spring assizes 1831, taken in short hand by Mr. Fraser.

existence of the *disposition*, from which criminal actions proceed, to render it less improbable that a person proved to have used it would commit the offence charged, and to explain the real motive and character of the action. But proof of such language cannot be considered to dispense with the obligation of strict proof of the criminal facts ; for though malignant feelings may possess the mind, and lead to intemperate and even criminal expressions, they nevertheless may exercise but a transient influence, without leading to action.

SECTION 3.

PREPARATIONS FOR THE COMMISSION OF CRIME.

Premeditated crime must necessarily be preceded not only by impelling motives, but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion,—as of poison, coining instruments, combustible matters, picklock keys, dark-lanterns, or other destructive or criminal weapons, instruments or materials, and many other acts of apparent preparation for crime,—are important facts in the judicial investigation of imputed crime. Where a man had in his possession a large quantity of counterfeit coin unaccounted

for, and there was no evidence that he was the maker, it was held to raise a presumption that he had procured it with intent to utter it*. But the personal character for probity, and the civil station of the party, are highly material in connexion with facts of this kind. A medical man, for instance, in the ordinary course of his profession has legitimate occasion for the possession of poisons, a locksmith for the use of picklock keys.

Facts of the kind referred to become more powerful indications of guilty purpose, if false reasons are assigned to account for them ; as, for instance, in the case of possessing poison, that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases. A female convicted at the Warwick summer assizes, August 1831, of the murder of her uncle by poison, alleged that she had bought arsenic to poison mice, and pointed to a mouse which she said had been killed by it, whereas it was proved that the mouse had not died from poison†.

The bare possession of the means of crime, or other mere acts of preparation, without more conclusive evidence, are not in themselves of great

* *Rex v. Fuller, Russell and Ryan's Crown Cases*, p. 308.

† *Rex v. Mary Ann Higgins*, *London Medical Gazette*, vol. ix. p. 896 ; and *Annual Register* for 1831.

RECENT POSSESSION OF THE FRUITS OF CRIME. 67

weight, because, as in the case of the presumed existence of motives, the intended guilt may not have been consummated; and until that takes place there is the *locus penitentiae*. But as preparations must necessarily precede the commission of premeditated crime, some traces of them may generally be expected to be discovered; and if there be not clear and decisive proof of guilt, the absence of any evidence of such preliminary measures is a circumstance strongly presumptive of innocence.

SECTION 4.

RECENT POSSESSION OF THE FRUITS OF CRIME.

The possession of the fruits of crime recently after its commission, affords a strong ground for presuming that the party in whose possession they are found was the actual offender, unless he can satisfactorily account for such possession, and more especially if the property be of an unusual kind, or from its value or other circumstances be inconsistent with and unsuited to his station*. The foundation of the presumption in such cases is the consideration that, if the possession were lawfully acquired, the party would be

* Carrington and Payne, vol. ii. p. 459; Mascardus, De Probationibus, vol. ii. Conclusio dcccxxxiv.

able to give evidence of the circumstances in which it originated ; and, if he cannot do so, it is reasonable and just to conclude that he obtained it dishonestly.

The question of what is or is not a recent possession must be considered with reference to the nature of the property ; therefore where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call upon the prisoner to show how he came by the property*. But where the only evidence against a prisoner, charged with a larceny, was that the stolen property was found in his possession three months after the loss of it, it was held that this was not such a recent possession as to put him upon showing how he came by it, unless there was evidence of something more than the mere fact of the possession of the property at that distance of time†.

A remarkable application of this rule of presumption occurred at the Aberdeen autumn circuit of 1824, in the trial of John Downie and Alex-

* *Rex v. Partridge* ; Carrington and Payne, vol. vii. p. 551.

† *Rex v. Adams* ; Carrington and Payne, vol. iii. p. 600.

ander Milne. A carpenter's workshop at Aberdeen was broken open on a particular night, and some tools carried off. On the same night the counting-house of Messrs. Davidson at Footdee, and of Messrs. Catto and Co. on the Links at Aberdeen, were both broken into, and goods and money to a considerable extent stolen. The prisoners were met at seven on the following morning in one of the streets of Aberdeen, at a distance from either of the places of depredation, by two of the police. Upon seeing the officers, conscience-struck they began to run; and being pursued and taken, there was found in the possession of each a considerable quantity of the articles taken from Catto and Co., but none of the things taken from the carpenter's shop or Davidson's. But in Catto and Co.'s warehouse were found a brown coat and other articles got from Davidson's, and which had not been there the preceding evening when the shop was locked up; and in Davidson's were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto and Co.'s proved that the prisoners were the depredators in that warehouse; while the fact of the articles taken from Davidson's having been left there, connected them with that prior housebreaking; while, again, the chisels

belonging to the carpenter's shop, found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The prisoners were convicted of all the thefts*.

A still more extraordinary case of the same kind occurred at Aberdeen in April 1826, in the trial of Charles Bowman, who was accused of no fewer than nine different acts of theft by house-breaking, committed in and around Aberdeen at various times during the summer of 1825 and the following winter. No suspicion had been awakened against the prisoner, who was a carter, living an industrious and apparently regular life, until one occasion, when some of the stolen articles having been detected in a broker's shop, and traced to his custody, a search was made, and some articles from all the houses broken open found amongst an immense mass of other goods, evidently stolen, in a large chest, and concealed about various parts of the prisoner's house. Their number, variety, and the place where they were found were quite sufficient to convict him of receiving the stolen property; but as they were discovered at the distance of many months from

* Allison's Principles of the Criminal Law of Scotland, p. 313; Mascardus, De Probationibus, vol. ii. Conclusio DCCCXXXI.

the times when the various thefts had been committed, the difficulty was how to connect him with the actual theft. The charges selected for trial were five in number, and as nearly connected with each other in point of time as possible. In none of them was the prisoner identified as the person who had broken into the houses, although the thief had been seen, and more than once fired at ; but in all the first four houses which had been broken into were discovered some of the articles taken from the others, and in the prisoner's custody were found some articles taken from them all, which sufficiently proved that all the depredations had been committed by one person ; and the mark of an iron instrument was found on three of the windows broken, which coincided exactly with a chisel left in the last house. Two days after the housebreaking of that house, an old watch, belonging to the owner Mr. Bruce, was shown by the prisoner to a shop-keeper in Old Meldrum, to whom it was soon afterwards sold, and by him delivered up to the officers. Upon this evidence the prisoner was convicted of all the charges of housebreaking, and received sentence of death, which was afterwards commuted to transportation for life*.

* Allison's Principles of the Criminal Law of Scotland, p. 314.

This rule of presumption is not confined to the case of theft, but operates in respect of crimes of every description, even the highest and most penal. Thus upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present and concerned in the offence*.

So the possession of the fruits of crime is often of great weight even to infer the guilt of murder, where that crime has been accompanied by robbery, of which the following are striking illustrations.

John Diggles was convicted at Lancaster spring assizes, 1826, of the murder of two aged persons, Benjamin Cass and his wife, when this rule of presumption was very emphatically laid down by Mr. Justice Bayley, who added that the presumption of guilt becomes much stronger, if the party, in endeavouring to account for his possession of the property, gives a false statement. The deceased were last seen alive about ten in the evening of the 1st of October 1825, and were found dead about six o'clock on the following morning. The prisoner was acquainted with the deceased,

* Rickman's case, *East's Pleas of the Crown*, vol. ii. p. 1035 ; and see Fuller's case, *Russell and Ryan's Crown Cases*, p. 308.

and had been seen in the vicinity of their cottage between four and five o'clock in the afternoon of the day on which they were murdered, and he was also seen on the following morning at ten o'clock proceeding in a direction from the spot. On the evening of Sunday the 2nd of October, and on the following day, the prisoner sold several articles of wearing apparel, proved to have belonged to the old man, to persons to whom he gave false accounts as to the place from whence he had come. Upon his apprehension a few days afterwards, the prisoner stated that he had bought the articles in question on the Sunday. In the waistcoat pocket the person who purchased it from the prisoner found a pair of spectacles, which were proved to have belonged to Cass ; as to which the learned Judge observed, that " it was not very likely that the old man should have sold them, and that such articles become, as it were, part of a man's person." The prisoner was convicted, and before his execution confessed his guilt*.

Upon the trial of Robert Turner Watkins, at the Worcester summer assizes, 1819, for the murder of Stephen Rodway on the 7th of May preceding, the principal criminatory circumstance was, that several money notes which had been paid to the

* Manuscript.

deceased on the 3rd of May were traced to the possession of the prisoner on the 8th, who on that day transmitted by post one of them, a 5*l.* note, to a person, to whom on the 10th he sent a letter requesting the return of it, on the false plea that there was a dispute about its genuineness, and that the party from whom he had taken it was in custody*.

At the Perth circuit, 8th September 1830, James Henderson was accused of the murder of an old man named Millie, who lived in a lonely cottage near the gate of Melville Park, in the county of Fife. The accused was an apprentice of the deceased, and had in consequence ample means of knowing where his money and valuables were placed. He had considerable property in linen and other articles of household plenishing, and also a deposit bank receipt for 40*l.*, in the house. A few days before the day charged as that of the murder the deceased was seen alive and well; but the prisoner, the day following, ordered the girl who brought him milk in the morning not to bring it any longer for some time, as his master was going from home. Neither the prisoner nor the deceased were seen for several weeks: but at length, alarmed at the deserted

* Annual Register for 1819, p. 69.

aspect of the cottage, the neighbours entered and made a search, and discovered the body buried in the garden, bearing marks of violence and wounds in many places. There were marks of an attempt to make an excavation in the interior of the cottage, which appeared to have failed. The prisoner was proved, some days after the night mentioned in the indictment, to have brought a carter in the night to the cottage of the deceased, and taken a variety of articles from the house ; and large quantities of the deceased's moveables were traced to the prisoner's possession, and sold by him in Dumfermline and other places, whither he had retired after the death of the deceased. He was repeatedly asked by the neighbours what had become of Millie before the discovery of the murder, and he gave contradictory accounts concerning him. He presented the deposit receipt at the bank for payment, with a forged signature of the deceased indorsed on it. The washerwoman who washed his clothes discovered some marks of blood on them shortly after the disappearance of the deceased. The defence pleaded,—that the theft only and not the murder was proved against the accused,—was over-ruled, and he was convicted, and shortly after confessed his guilt*.

* Allison's Principles of the Criminal Law of Scotland, p. 78.

A Cornish peasant, engaged in attending upon the lighthouse on the Western coast, was found dead in a field near the public road leading from Penzance to the Land's End, on Sunday, December the 12th, 1813 ; he was lying in a dry ditch, with his stick at a little distance from him ; one of his shoes was down at the heel, and both were smeared with mud, and his pockets were empty. The body was taken to a public-house in the village, and the coroner having received notice of the occurrence, an inquisition was taken, and a verdict of wilful murder returned against some person or persons unknown. The body was afterwards buried, but a rumour having arisen that the anatomical inspection had not been sufficiently minute and satisfactory, it was disinterred, and a further investigation took place. Upon examining the body, patches, arising from extravasated blood, were seen in different parts of the throat, and distinct abrasions corresponding with the nails were visible ; the face presented the physiognomy of a strangled man. On the chest bruises, evidently occasioned by the pressure of the assailant's knees, were also noticed. Upon dissection the brain was found excessively turgid with blood : the rest of the organs appeared in a healthy and

natural condition. The field in which the deceased was found contained several shafts of abandoned mines ; and tracks were observed in the grass, as if it had been scraped, proceeding in a direction from the hedge next the public road to that in the opposite part of the field, and under which the body was found ; near the former hedge also some fragments of a glass bottle were discovered. The deceased had been at Penzance for some medicine, and had left that town on his return to the lighthouse with a phial in his pocket. These circumstances combined led to the conclusion that the deceased had been strangled, probably at the spot where the glass fragments were found, which were undoubtedly the remains of his phial broken during the scuffle ; besides it would appear that he had been dragged along the field from this spot to the opposite hedge, for marks denoting such an act were visible on the grass, and this received further confirmation from the condition in which his shoes were found. From the circumstance of the murder having been perpetrated in a field containing several old mines, without any attempt on the part of the villain to avail himself of the advantage which these caverns would have afforded for the concealment of the dead body, it was concluded that the perpetrator of the deed would

be found in some stranger to the country, for such a one alone could be unacquainted with the mines alluded to. The suggestion of this idea naturally gave a direction to the line of inquiry. The deceased had been seen, it was discovered, playing at cards in a public-house with some of the privates of the artillery stationed in Mount's Bay, amongst whom was a powerful and athletic Irishman of the name of Burns, who had lately landed and immediately enlisted into the corps. Burns was accordingly arrested on suspicion, when the purse of the deceased, containing thirty shillings, was found on his person,—a fact decisive of his connexion with the crime, especially as he was unable to show where he was at the time the deceased left Penzance in the evening; he was also subsequently recognised by two witnesses, who had seen him accompanying the deceased on the road toward the Land's End. The prisoner was convicted and executed, having previously made a full confession of his guilt, in which he acknowledged that he had strangled his victim with a pocket-handkerchief, but from the difficulty of completing the act had been compelled to press his knees upon his chest*.

* Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 27.

But the bare possession of stolen property, uncorroborated by other evidence, is sometimes a fallacious criterion of guilt. Sir Matthew Hale lays it down, that "if a horse be stolen from A., and the same day B. be found upon him, it is a strong presumption that B. stole him; yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B. was condemned and executed at Oxford assizes, and yet within two assizes after, C., being apprehended for another robbery, and convicted, upon his judgement and execution confessed he was the man that stole the horse, and being closely pursued desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion and escaped; and B. was apprehended with the horse, and died innocently *."

A young man named John Gill was convicted at the summer assizes at Croydon in 1827 for stealing two oxen. The prisoner, having finished his apprenticeship to a butcher at Monk Wearmouth, went to visit an uncle at Portsmouth, from whence he set out to return to London. On the road from Guildford to London, about three o'clock in the morning, he overtook a man

* Hale's Pleas of the Crown, vol. ii. p. 289.

riding upon a pony and driving two oxen. On finding that Gill was going to London, the man offered him 5s. to drive the oxen for him to London, which he agreed to do, the man engaging to meet him at Westminster Bridge. At Wandsworth the prisoner was apprehended by the prosecutor's son, and charged with stealing the oxen. On being apprehended he assumed the name of Watson, under which he was tried, to conceal his situation from his friends. The jury, from the circumstances of the stolen property being found upon the prisoner, and his account not being thought satisfactory, convicted him: but upon a representation of the circumstances he received a pardon, when on the point of being transported for life*. The young man had been the dupe of the real thief, who, finding himself hotly pursued, had fallen upon this scheme to rid himself of the possession of the cattle.

A man named Ellis was tried at the Old Bailey sessions with three others for house-breaking, and found guilty on proof of the recent possession of the goods. It was afterwards ascertained that the prisoner, who had long been known as a receiver of stolen goods, knew nothing of the robbery until after it had

* Annual Register for 1827.

been committed, and had purchased the goods from the real thieves the day after the robbery. He very narrowly escaped execution*.

It is seldom that juries are called upon to determine upon the effect of evidence of the mere naked recent possession of stolen property ; a fact which, from the nature of the case, is generally accompanied by other explanatory circumstances of presumption. If the party secrete the property,—if he deny that it is in his possession, and such denial is discovered to be false,—if he cannot show where he was at the time of the theft, or how he became possessed of the property,—if he give false, incredible, uncorroborated, or inconsistent accounts of the manner in which he acquired it, as that he had found it, or that it had been given or sold to him by a stranger, or left at his house,—if he abscond or endeavour to escape from justice,—if other stolen property, or picklock keys, or other instruments of crime be found in his possession,—if he were seen near the spot,—or if any article belonging to him be found in or near the place where the theft was committed, at or about the time of the commission of the offence,—if the impressions of his shoes or other articles of apparel correspond with

* Annual Register for 1831.

the marks left by the thieves,—these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession, and they render it morally certain that such possession is referable to a criminal origin; since they cannot be rationally accounted for but upon the supposition of the commission of the offence by the prisoner*.

Upon the principle of this rule of presumption, a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavourable to the supposition of innocence. A man named Macleod was tried at Inverness in the autumn of 1831 for the murder and robbery of a pedlar of the name of Grant, in a desolate part of Assynt in the summer of 1830. It appeared in evidence that Grant set out from Lochbroom in Sunderland about a month before his death, having about 40*l.* worth of goods in his pack. He came in the beginning of June into the neighbourhood of Loch Tor-na-Eign, in Assynt, where he slept in the house of one Graham, and in the room with his sons, one of whom was an

* Hume's Commentaries on the Law of Scotland, vol. i. pp. 151, 161. Allison's Principles of the Criminal Law of Scotland, p. 320.

intimate friend and neighbour of the prisoner, and had an opportunity of seeing his money, which was kept in a leathern bag, and consisted of 36*l.* in silver and notes, the produce of the sales of almost all the pack. On a Friday morning, June 19, the prisoner was in a cottage along with Grant, and they left the village together, taking the road towards the place where the body was afterwards found. The prisoner at two o'clock on that day was seen by a girl at the distance of about five miles from that village, and within 200 yards of the spot where the body of Grant was afterwards discovered; and he told her not to mention that she had seen him there. The deceased himself about the same hour set out from a cottage about a mile off, after having asked the road to a place in going to which he must pass near that spot. The prisoner was not again seen, but it was proved that he was not at school, as he should have been that day; and soon afterwards he began to show a considerable command of money, having changed a 5*l.* note with a grocer in the neighbourhood, bought a gun for thirty shillings, and squandered various small sums to the amount of two or three pounds more. Previously to that day, he was in such needy circum-

stances, that the neighbours would not have trusted him for five shillings, and his relations were all as poor as himself. The body of the deceased, who was never again seen alive, was found about six weeks afterwards floating in Loch Tor-na-Eign, at the distance of about 200 yards from the place where the prisoner had been seen by the girl. A place was discovered close to the shore, where the body had lain for some time previous to its immersion in the lake, covered with heath. The body bore several ghastly marks of wounds, such as could not have been inflicted by suicide or accident ; and the prisoner, when the crowd were examining the body, stood aloof on a hill without approaching the bloody object. Shortly afterwards he set out in company with his friend Graham, in whose house the deceased had slept the night before his death, to a minister about five miles off, requesting an order to bury the body at the public expense, representing the death as evidently one of suicide. A few days before the death of the deceased he had purchased some stockings from an old woman in the neighbourhood, and one of these pairs was afterwards identified by her, having been left by the prisoner some time afterwards at a house where he took them off his feet on occasion of

being wet. Two other pairs of the same kind, and having the same number of bars of blue and white as those sold to the deceased, were found on the prisoner, or in his house, after his apprehension. When in prison he exhibited two bank-notes, one of which he got changed at far less than its value by a fellow-prisoner, to whom he tendered it through the window of his cell. This evidence left no doubt in the mind of any reasonable man of the prisoner's guilt, and he was convicted and executed*.

The rule of presumption under discussion is often attended with uncertainty in its application, from the difficulty which sometimes attends the identification of articles of property alleged to have been stolen ; and it ought not therefore to be applied in any case, where there is reasonable ground to conclude that the witnesses may be mistaken, or where from any other cause identity is not infallibly established. Some instructive exemplifications of the danger which may result from the neglect of this salutary distrust of a rule which, however correct in its general application, is still one of presumption only, will occur in a subsequent part of this Essay.

* Allison's Principles of the Criminal Law of Scotland, p. 245 ; and see the case of Mary Ann Burdock, *post*.

SECTION 5.

UNEXPLAINED APPEARANCES OF SUSPICION, AND
ATTEMPTS TO ACCOUNT FOR THEM BY FALSE
REPRESENTATIONS.

It is a fair conclusion that an innocent party can generally explain unusual appearances connected with his person or conduct ; and that the desire of self-preservation, if not a regard for truth, will prompt him to do so. The ingenuous and satisfactory explanation of circumstances of apparent suspicion always operates powerfully in favour of the accused, and obtains for him more ready credence where the explanation may not be so easily verified.

On the other hand, the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able to explain. Duncan Buy was tried at Inverness in May 1736 for the murder of a woman pregnant by him ; one of the chief circumstances was that the prisoner had a bloody shirt under a clean one, with regard to which he gave no satisfactory explanation*.

False statements, for the purpose of accounting

* Burnett on the Criminal Law of Scotland, p. 532.

for suspicious circumstances connected with the person, dress, or conduct, when clearly disproved and contradicted, become facts of a highly criminatory effect ; and the allegations urged, as reasons tending to defence and exculpation, are, not neutralized merely, but become formidable inculpatory facts*.

Allowance must nevertheless be made for the difficulties which may attend the proof of circumstances of exculpation ; and care must be taken that circumstances are not erroneously assumed to be suspicious without sufficient reason †.

SECTION 6.

INDIRECT CONFSSIONAL EVIDENCE.

Although direct confession does not fall within the province of this Essay, it is necessary to state the principal rules which relate to that important head of moral evidence ; because they are of great moment in their application to such heads of circumstantial evidence as are only indirectly in the nature of confessional evidence.

A direct confession of guilt is justly regarded as evidence of the most conclusive and satisfac-

* See the case of William Richardson, *post*.

† See the case of Abraham Thornton, *post*.

tory nature*. Self-love, the main spring of human conduct, will usually prevent a rational being from making admissions prejudicial to his interest and safety, unless when caused by the promptings of truth and conscience. But it may be doubted whether justice and policy ever sanction conviction, where there is no other proof of the *corpus delicti* than the uncorroborated confession of the party. Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. "Though," says he, "the Lord Chief Justice told the King that 'all his discourse was so disjointed he did not believe him guilty,' yet upon his own confession the jury found him guilty, and he was executed accordingly:" the historian adds, "though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only upon his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted

* Mascardus De Probationibus, vol. i. Quæstio vii. l. 11. and Conclusio MCCXXIX. 14, 15.

wretch, weary of life, and chose to part with it this way*." However the fact may be explained, such cases are by no means uncommon†. The State Trials contain numerous confessions of witchcraft, and abound with circumstantial but absurd and incredible details of communications with evil spirits; which only show that the parties were either impostors or the involuntary victims of invincible self-delusion.

A distinguished foreign lawyer observes, that "whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional

* Lord Clarendon's *Life, and Continuation of his History of the Rebellion*, vol. iii. p. 94 (Clarendon, ed. 1827); and see a case of false confession of housebreaking and murder, *Annual Register* for 1833, p. 74.

† Eden's *Principles of Penal Law*, ch. xv.

than impolitic, and should be regarded as offensive to the intelligence both of the Court and jury*."

The weight which is attached to a confession of guilt is grounded upon the supposition that it is deliberate and voluntary. "Hasty confessions," says Sir Michael Foster, "made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported,—whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to mis-construction, and withal this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted†."

The infliction of torture in order to obtain confession has always been illegal in this country; and yet, with a strange inconsistency, it was commonly applied for that purpose, even down to so late a period as 1640, under colour of a tyrannic prerogative beyond the reach of the Common Law,

* Hoffman's Course of Legal Study, vol. i. p. 367.

† Foster's Crown Law, p. 243.

and uncontrollable by any of its remedial powers. This barbarous practice has prevailed in many countries almost to the present time, if it do not even still exist in some*. Few persons, nevertheless, will feel compelled to assume, with the learned author of the Rise and Progress of the English Commonwealth, "that it could not have been allowed to subsist amongst the most polished nations of Europe without some pretence of natural equity †."

Many are the instances on record of confessions, extracted by the torment of the rack, of offences which were never committed, or not committed by the persons making confession. Not to mention others, a man was executed in France in 1793 for the alleged murder of a woman, who within two years afterwards was discovered to be alive ‡; and at Dresden, in 1821, a soldier named Fischer, who was suspected of having robbed and murdered a German painter, was consigned to a loathsome dungeon to extort confession; at length he confessed; but the crime was clearly brought home to another sol-

* Jardine on the Use of Torture in the Criminal Law of England, p. 3. London, 1837.

† Palgrave's Rise and Progress, etc., vol. i. ch. vii.

‡ Jardine, *ut supra*, p. 6; and see Fortescue, De Laudibus Legum Angliæ, ch. xxii.

dier in time to prevent his execution, and he was liberated*.

When Felton, upon his examination at the Council Board, declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham, the Bishop of London said to him, "If you will not confess, you must go to the rack." The man replied, "If it must be so, I know not whom I may accuse in the extremity of the torture,—Bishop Laud perhaps, or any lord at this Board†." "Sound sense," observed the excellent Sir Michael Foster, "in the mouth of an enthusiast and a ruffian‡."

Not less repugnant to policy, justice, and humanity is the moral torture to which in some (perhaps in most) of the nations of Europe, persons suspected of crime are subjected, by means of searching, rigorous and insidious examinations, conducted by skilful adepts in judicial tactics, and accompanied sometimes even by dramatic circumstances of terror and intimidation§.

* Bentham's *Rationale of Judicial Evidence*, b. ii. ch. 4; and see Jardine, *ut supra*.

† Rushworth's *Collections*, vol. i. p. 638.

‡ Foster's *Crown Law*, p. 244.

§ See the case of Riembaur, a Bavarian priest, charged with murder, in the *Foreign Quarterly Review*, vol. viii. p. 287.

A great injustice is done, if a confessional statement be distorted, or where it is consistent, if it be but partially adopted. At Worcester spring assizes in 1830, Thomas Clewes was tried for the murder of Richard Hemming, about 24 years before ; and the principal inculpatory evidence consisted of the prisoner's confession, which stated in substance that he was present at the murder, but came to the spot without any knowledge that a murder was intended, and took no part in it. It was strenuously urged that the prisoner's guilt must be presumed from his presence at the murder ; but Mr. Justice Littledale held that the whole statement must be taken together ; and that, so qualified, it did not in fairness amount to an admission of the legal guilt of murder*. A learned writer mentions an extraordinary case of the mistaken application of this rule. A., being in company with B., had his pocket picked of three guineas ; B. told C. triumphantly that he had picked A.'s pocket of four guineas. This was stated by a Court of Quarter Sessions to the jury as an inconsistency which destroyed the presumption of guilt. The writer adds, " But supposing there to have been a falsehood or inaccuracy with respect to the number mentioned by B., or an inaccuracy

* Carrington and Payne's Reports, vol. iv. p. 221 ; and printed short-hand Report.

with respect to C.'s relation, the variation in this respect did not destroy the presumption, or rather conclusion, arising from B.'s saying that he had picked the pocket of A.*."

It is obvious that every caution which is observed in the reception of evidence of a direct confession, ought to be applied with especial deliberation in the reception of the analogous evidence of statements and circumstances which are only indirectly in the nature of confessional evidence ; since such statements from the nature of the case must be ambiguous, or relate but obscurely to the *corpus delicti*. Upon the trial of Richard Coleman at the Kingston Assizes, in March, 1748-9, for the murder of Sarah Green, who had been brutally assaulted by three ruffians, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion soon attached to the prisoner. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered " Yes, what of that ? " The witness said that he then asked him if he was not one of the parties concerned in that

* Evans's Pothier., vol. ii. p. 342.

affair ; to which he answered, according to one account, " Yes I was, and what then ? " or, as another account states, " If I was, what then ? " It appeared that the prisoner was intoxicated, and that the questions were put with the view of ensnaring him ; but, doubtless much influenced by this imprudent and blameable language, the jury convicted him, and he was executed. The real offenders were afterwards discovered, and two of them were executed for this very offence, the third having been admitted to give evidence for the Crown, and the innocence of Coleman was rendered indubitable*.

In the most debased persons there is an involuntary tendency to truth and consistency, except when the mind is on its guard, and studiously bent upon concealment. This law of our nature sometimes gives rise to evidentiary facts of great weight. In the case of Eugene Aram, who was tried in the year 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of Houseman, his accomplice, led to Aram's conviction and execution. In the month of August, 1758, about thirteen years after the time of Clark's being

* Remarkable Trials, vol. i. pp. 162, 172. Celebrated Trials, vol. iv. p. 344, *Rex v. Jones and Welch*.

missing, a labourer employed in digging for stone to supply a limekiln near Knaresborough, discovered a human skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark, on the very night before he was missing. Houseman was summoned to attend the inquest, and discovered signs of uneasiness : at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, " This is no more Daniel Clark's bone than it is mine ;" from which it was concluded, that if he was so certain that the bones before him were not those of Clark, he could give some account of him. He was pressed with this observation ; and, after various evasive accounts, he made a full confession of the crime ; and search being made, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it*.

This natural tendency to consistency may often be traced in minute and unpremeditated acts, which are occasionally of great importance in

* The genuine account of the life and trial of Eugene Aram, etc., *supra* ; and Biographia Britannica, article EUGENE ARAM.

directing the judgement in its conclusions. Sellis, who attempted to assassinate the Duke of Cumberland in 1810 and afterwards destroyed himself, though not a left-handed man, was equally expert in the use of the razor with his left as with his right hand; and the razor with which the act had been committed was found lying by the *left* side of his bed. His coat was found hanging upon a chair six or seven feet from the bed, and out of the reach of blood from the bed; and the side outward next to the bed had no blood upon it, while the sleeve, which was inaccessible to blood from the bed, was sprinkled from the shoulder to the wrist with blood quite dry, from a wounded artery, which clearly could not have proceeded from such a stream of blood as must have gushed from his self-inflicted wound*. A late writer on medical jurisprudence doubts the possibility of distinguishing venous from arterial blood after having been so long exposed as to become dry†; but the quality of the blood

* Trial of Josiah Phillips for a libel on the Duke of Cumberland, and the proceedings previous thereto arising out of the suicide of Sellis in 1810, from the short-hand notes of Mr. Gurney, etc., p. 119.

† Taylor's Elements of Medical Jurisprudence, p. 351; and see the case of Thomas Mackenzie, Syme's Justiciary Reports, vol. i. p. 327.

and the guilt of Sellis appear to have been inferred principally from the fact of the coat-sleeve having been *sprinkled*, whereas it would have been *soaked* if the blood had proceeded from the wound of which Sellis died*.

To this head may be referred the acts of concealment, disguise, flight, and many other *ex post facto* indications of mental emotion†. By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods whether he were found guilty or acquitted, and the officer always, until the recent abolition of the practice by statute, called upon the jury after verdict to state whether the party had fled for it‡. These several acts in all their modifications are indications of fear; but it would be harsh and unreasonable invariably to interpret them as indications of moral consciousness, and greater weight has sometimes been attached to them than they fairly warranted. Doubtless the manly carriage of integrity always commands the re-

* Beck's Medical Jurisprudence, p. 540; and see the Legal Observer, vol. i. pp. 240, 256.

† See an enumeration of circumstances of this kind in Bentham's Rationale of Judicial Evidence, book viii. chap. ix.

‡ Blackstone's Commentaries, vol. iv. 387.

spect of mankind ; and all tribunals do homage to the great principles from which consistency springs ; but it does not follow that because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, the converse is always true. Men are differently constituted as respects both animal and moral courage ; and fear may spring from causes very different from that of conscious guilt. Mr. Justice Abbott on the trial of Mr. Donnall for the murder of Mrs. Downing, observed in his charge to the Jury, that “ a person, however conscious of innocence, might not have courage to stand a trial ; but might, although innocent, think it necessary to consult his safety by flight.” “ It may be,” added the learned judge, “ a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences ; but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is*.” It is not possible to lay down any express test by which these various indications may be

* The Trial of Robert Sawle Donnall, etc., taken in shorthand by Alexander Frazer : London, 1817.

infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances. Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty. In the endeavour to discover truth no evidence should be excluded ; but that case must be very scanty of evidence which demands that importance should be attached to circumstances so fallacious as the acts in question. In the case of Richard Coleman, who was convicted at the Kingston assizes in April 1748-9 of the murder of Sarah Green, the magistrate, convinced of the prisoner's innocence, allowed him to go at large on bail to appear at

the assizes. The coroner's inquest having brought in a verdict of guilty against him he absconded ; but he was subsequently apprehended, brought to trial and convicted, although he adduced positive evidence of an *alibi*. About two years after Coleman's execution the real offenders were discovered, and two of them were tried at the Kingston assizes 1751, and upon the testimony of an accomplice, who was admitted to give evidence, convicted and executed, fully acknowledging their guilt*.

A remarkable fact occurred in the case of Haggerty, one of the men convicted, in February 1807, of the murder of Mr. Steele on the 5th of November 1802. In consequence of disclosures made by an accomplice, a police-officer apprehended the prisoner about four years after the murder on board the Shannon frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been about three years before ; to which he answered that he was employed in London as a day-labourer. He then asked him where he had been employed that time four years : the man immedi-

* *Rex v. Coleman, and Rex v. Jones and Welch*. Remarkable Trials, vol. i. pp. 162, 172. Celebrated Trials, vol. iv. p. 344.

ately turned pale, and would have fainted away had not water been administered to him. These marks of emotion derived their weight from the latency of the allusion—no express reference having been made to the offence with which the prisoner was charged—and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period*.

SECTION 7.

THE SUPPRESSION OR DESTRUCTION OF EVIDENCE.

The suppression or destruction of pertinent evidence is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavourably to the party in whose power it is†. A chimney-sweeper having found a jewel, took it to a jeweller's shop

* Celebrated Trials, vol. vi. p. 19. Annual Register for 1807, and Sessions Papers.

† Starkie's Law of Evidence, vol. i. p. 437.

to ascertain its value, who having removed it from the socket, gave him three halfpence, and refused to return it. The friends of the finder encouraged him to bring an action of trover against the jeweller, and the Lord Chief Justice Pratt directed the Jury that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages*. The most prejudicial fact in the trial of Captain Donellan was the rinsing of the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death.

In the before-mentioned case of Mr. Donnall, who was tried at Launceston spring assizes, 1817, before Mr. Justice Abbott, upon an indictment charging him with the murder of Mrs. Downing, his mother-in-law, a fact of the same kind was offered in evidence. The deceased was supposed to have been poisoned by the prisoner; and the contents of the stomach, which had been placed in a jug for examination, were clandestinely thrown by him into a vessel containing a quantity of water. The prisoner was acquitted on the ground of the insufficiency of the evidence

* *Armory v. Delamirie*, *Strange's Reports*, vol. i. p. 505.

of the *corpus delicti*; but beside the tampering with the contents of the stomach, evidence was given of other suspicious facts and declarations strongly indicative of conscious guilt*.

A boatman was tried at Warwick spring assizes, 1836, before Mr. Justice Bosanquet, for stealing a quantity of rum which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liverpool, as was his custom, had taken a sample of the spirit and tested its strength. Upon the delivery at its place of destination the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat, where the prisoner was, in order to require explanation; but as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke three jars and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted†.

To this head may be referred the common case of obliteration of marks of identity, as by filing

* The Trial of Robert Sawle Donnell, etc. *ut supra*.

† *Rex v. Thomas Thomas, ex relatione*.

away the engraving from articles of plate, or the removal or endeavour to remove from the person or clothes stains of blood or other marks.

Another common case of suppression of evidence occurs in the attempt to prevent *post mortem* examination by the premature interment of human remains, under the pretext that it is rendered necessary by the state of the body. In the case of violent death, and especially when caused by poison, it cannot but be known that the *post mortem* examination will always furnish important, and generally conclusive, evidentiary matter as to the cause of death*.

The total or partial destruction of human remains is another fact of this kind. A woman was murdered by a foreigner, who burnt her body ; but owing to the slow combustibility of animal matter he was occupied several weeks in his revolting task, and ultimately did not completely effect it†. A similar case occurred at the Leicester autumn assizes 1834. The prisoner having murdered a creditor, who had called to obtain a debt, cut his body into pieces, which he attempted to dispose of by burning. The effluvium

* See *Traité des Exhumations Juridiques*, par MM. Orfila et Lesuer.

† Gardelle's case, *Celebrated Trials*, vol. iv. p. 400.

and other circumstances alarmed the neighbours. A portion of the flesh remained unconsumed, sufficient to prove that the body was that of a male adult, and various articles which had belonged to the deceased were found on the person of the prisoner, who was apprehended in a boat putting off from the Black Rock at Liverpool, after having ineffectually endeavoured to drown himself. The prisoner was convicted and executed*.

To this head of evidence may also be referred all attempts to pollute or disturb the current of truth, or to prevent a fair and impartial trial ; as by endeavours to suborn or bribe, or otherwise tamper with, the prosecutor or his witnesses, or the officers or ministers of justice ; any of which acts, clearly brought home to the prisoner or his authorized agents, are of a most prejudicial and dangerous character.

The relevancy and force of facts such as those which have been particularized, are shown by the invariable uniformity with which persons pressed with such evidentiary presumptions endeavour to explain them away ; and they are justly considered to be incompatible with innocence, and referable to a consciousness of guilt and to a desire

* *Rex v. Cook*, Annual Register for 1832, p. 271 ; and see the case of *James Greenacre*, *infra*.

to evade the force of facts externally indicative of it, and they consequently subject the party guilty of them to very prejudicial inferences.

SECTION 8.

THE SIMULATION OF FACTS.

Facts are often simulated for the purpose of attracting suspicion in a direction different from the true one. Cunning is, however, but "a sinister or crooked wisdom;" and not unfrequently the means employed to prevent or avert suspicion lead to detection. Facts of this kind are properly considered as moral indications of a very influential nature. In the case of Richard Patch, who was convicted of the murder of Mr. Blight, his partner, the prisoner, a few evenings before the fatal deed, while his friend was at a distance from home, having sent a female servant, the only other inmate of the house, on an errand, fired a ball through the window of the room in which the deceased usually sat at night, doubtless with the intention of creating the impression that some other person was desirous of destroying him. The prisoner's object was to possess himself of his benefactor's business and property; and the more

effectually to divert suspicion from himself, he affected great tenderness and sorrow*. From the course of the ball through the shutter it was certain that it had been discharged from the deceased's own premises. A pistol, in all probability the instrument of this murder, was discovered several years afterwards in a neighbouring dock, the ramrod only having been found at the time†.

In the year 1764 a citizen of Liege was found shot, and his own pistol was discovered lying near him; from which circumstance, together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but on examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol. The real murderers were ultimately discovered‡, but not until after the terrors of the rack had been applied to an innocent girl, the niece of the deceased.

Mary Norkott, John Okeman and Agnes his wife were convicted, in the fourth year of the reign of Charles the First, of the murder of Jane Norkott under very singular circumstances of this

* See the Report of the Trial by Gurney, *supra*.

† Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 34.

‡ Ibid. vol. iii. p. 39.

nature. The deceased was found dead in her bed, her throat cut, and a knife sticking in the floor. Several persons who slept in the adjoining room deposed that the deceased went to bed with her child, her husband being absent, and that no person afterwards came into the house. The coroner's jury returned a verdict of *felo de se*; but suspicion being excited against these individuals, the jury, whose verdict was not yet drawn up in form, desired that the remains of the deceased might be taken up; and accordingly, thirty days after her death, they were taken up, and the jury charged the prisoners with the murder. They were tried at the Hertford assizes and acquitted, but so much against the evidence, that Judge Harvey let fall his opinion that it were better an appeal were brought than so foul a murder should escape unpunished. Accordingly an appeal was brought by the child against his father, grandmother, aunt, and her husband Oke-man. The evidence adduced was that the deceased lay in a composed manner in her bed, the bedclothes not at all disturbed, that her child lay by her side, and that her throat was cut from ear to ear, and her neck broken. There was no blood in the bed, except a tincture on the bolster where her head lay. From the bed's

head there was a stream of blood on the floor, which ran along till it pounded in the bendings of the floor. There was also another stream of blood on the floor at the bed's foot, which pounded also on the floor to a very great quantity; but there was no communication of blood between these two places, nor upon the bed. A bloody knife was found in the morning sticking in the floor, at some distance from the bed; but the point of the knife, as it stuck, was toward the bed, and the handle from the bed, and there was the print of the thumb and fingers of a left hand. Okeman was acquitted, but the others were convicted and executed*.

In the case of John Swan and Elizabeth Jeffreys, who were convicted at the Chelmsford spring assizes, 1752, of the murder of Joseph Jeffreys, the uncle of the female prisoner, it appeared that the deceased was murdered in the night, and that the prisoners gave an alarm of murder from within the house; whereas the undisturbed state of the dew on the grass on the outside rendered it certain that the parties implicated were domestics†.

* State Trials, vol. xiv. p. 1324; Beck's Elements of Medical Jurisprudence, p. 543.

† State Trials, vol. xviii. p. 1193, and *infra*.

Green, Berry, and Hill were tried in the year 1678 for the murder of Sir Edmundbury Godfrey, who was strangled by a handkerchief in Somerset House on a Saturday night, and, after remaining concealed until the following Wednesday, he was carried at midnight into the fields beyond Soho and thrown into a ditch, and his own sword thrust through his body, in order to excite a belief that he had committed suicide*.

A learned writer on the law of evidence says he has remarked, "that persons of the lowest class of society, before the commission of premeditated murder, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim." "This," he adds, "is a circumstance which I apprehend is to be attributed principally to an expectation that by this means less of surprise and of inquiry will take place when the crime has been accomplished†;" and the observation may be applied to other crimes in general as well as to that of murder. In the case of Susannah Holroyd, convicted of murder at the Lancaster assizes, September 1816, the prisoner, about a month before she committed

* *State Trials*, vol. vii. p. 159.

† *Starkie's Law of Evidence*, vol. i. p. 502.

the act, told the mother of an infant whom she destroyed with her own husband and child, that she had had her fortune read, and that within six weeks three funerals would go from her door, those of her husband, her son, and the child of the person she was addressing*.

To this class of facts may be referred the case of false representations as to the state of another person's health, with the intention of preparing the connections for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence, as was done by Captain Donellan respecting Sir Theodosius Boughton †. Another common circumstance of the kind in question is the pretence of having taken part of the draught from which death is alleged to have ensued ‡. So it is not unusual to endeavour to induce the suspicion of suicide by placing some instrument of destruction in the hand of the murdered party; but consistency is often overlooked, by placing the weapon in the left hand, a curious instance of which took place in the case of Margaret Webb, for whose murder John Fitter was

* Celebrated Trials, vol. vi. 167.

† See Gurney's Report of the Trial, *supra*.

‡ Rex v. Kezia Wescombe, Exeter summer assizes, 1829; Annual Register for 1829, p. 142.

tried at the Warwick autumn assizes, 1834, before Mr. Justice Taunton*.

Sometimes the object of simulated facts is not merely to divert suspicion from the real culprit, but to attract it toward a particular individual† : and such is the weakness of human nature, that there are even instances where innocence has degraded and betrayed itself by the simulation of facts, for the purpose of evading the force of circumstances of apparent suspicion. An instructive case of the kind is mentioned by Sir Edward Coke‡. “ In the county of Warwick,” says he, “ there were two brethren ; the one having issue a daughter, and being seised of lands in fee, devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age: her uncle for some offence correcting her, she was heard to say, ‘ Oh, good uncle, kill me not !’ After which time the child, after much inquiry, could not be heard of : whereupon the uncle, being

* Annual Register for 1834, p. 115 ; and printed Report of the Trial.

† See the case of Richard Coleman, *supra*.

‡ Third Institutes, etc., ch. 104. p. 232.

suspected of the murder of her, the rather for that he was her next heir, was upon examination, anno 8 Jac. Regis, committed to the jail for suspicion of murder, and was admonished by the justices of assize to find out the child, and thereupon bailed until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child as like unto her both in person and years as he could find, and appareled her like unto the true child, and brought her to the next assizes ; but upon view and examination she was found not to be the true child ; and upon these presumptions he was indicted, found guilty, had judgement and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to school ran away into the next county ; and being well educated, she was received and entertained of a stranger : and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proved to be the true child." The learned author adds, " We have reported this case for a double caveat : first to judges that they in case of life judge not too hastily upon bare presumption ; and, secondly, to the innocent and true man, that he never seek

to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself as the uncle did."

An unsuccessful attempt to establish an *alibi* is always a circumstance of great weight against the prisoner, because the resort to that kind of defence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them; and where the defence of *alibi* fails, it is generally on the ground that the witnesses are disbelieved and the story considered to be a fabrication*. But this observation is not universally true: an extraordinary case to the contrary occurred at the Old Bailey sessions in 1824, in the case of a young gentleman of the name of Robinson, who, on the positive evidence of many persons as to his identity, was convicted of larceny; but in several other cases where he was sworn to with equal positiveness, an *alibi* was satisfactorily proved, and he received a pardon†.

The defence of an *alibi* often involves considerations of the most difficult and perplexing nature. It is not an uncommon artifice to endeavour to give coherence and effect to a fabri-

* *Rex v. Edward Harris*, Sessions Papers, 1824.

† Sessions Papers, 1824, and *infra*.

cated defence of *alibi*, by assigning the events of another day to that on which the offence was committed ; so that the events, being true in themselves, are necessarily consistent with each other, and false only as they are applied to the day in question. A learned writer reports a case where a gentleman was robbed, and swore positively to the prisoner ; but nevertheless the completest *alibi* was proved. The witnesses, examined separately, all spoke to the same minute circumstances transpiring whilst the prisoner was in their company on the day and hour of the robbery ; and in particular that a church bell for funerals was tolling, which in fact tolled almost every day at that particular hour when the robbery was committed. The prisoner was acquitted. A year afterwards the gentleman, seeing the prisoner in a little shop, went to him, and gave him his word that, as now all danger was over, if he would tell him the truth, no injury should happen to him, but the contrary. The man said ; " I did rob you ; the *alibi* was concerted. I knew it was false, and when the jury turned round to consider the verdict, I felt a shuddering within me, unlike anything I had ever before felt or believed I could feel. The consequence was, that I vowed to get my bread

in a different way for the future ; and with this purpose have got into this little shop*.”

The following case affords an illustration of the embarrassment which is sometimes created in cases of this kind. William Durrand, John Henderson, and George Jamieson were tried at Inverness (September 1830,) for the murder of a mariner named Small. He was found stiff, with the fists clenched and the elbows akimbo, at the back of the Pier of Wick on September 2nd, 1825. The body was interred, and no suspicion fell on any particular person at that time. Five years afterwards, in consequence of information received, the prisoners were apprehended, and the body was raised from the grave. It was found with the bones of the arms and hands still in the same posture in which they were when first discovered ; and it was proved that they could not be straightened by the utmost exertion of strength at the time when the body was first interred, and that this effect usually takes place when death ensues in the midst of great struggling. On the trial it was sworn by a girl, who was at the time servant in the house, that the deceased and his captain came to drink in the evening, and

* London Medical Gazette, vol. viii. p. 36, mentioned by Mr. Amos in one of his Lectures.

were shown into a room below, where the prisoners were sitting; that after they had been there some hours, the landlady, wife of the prisoner Durrand, came into the room where she was lying, and looked in her face with her candle to see if she was sleeping; and that her suspicions being excited, she followed her, and saw the three prisoners Mrs. Durrand, and seven or eight other persons surrounding Small's dead body; that the arms were akimbo, as if death had taken place during a desperate struggle; that the whole party took the body down into a cellar; and that she, the witness, followed them, and saw through the keyhole that Mrs. Durrand took 20*l.* in bank-notes out of the pocket of the deceased, and divided it among the three prisoners; that the body was taken out about three in the morning, carried to the back of the pier, and there thrown over. Farquhar, who was present at the murder, deposed that the three prisoners and Small, the deceased, were in the room together, when a quarrel ensued between Durrand and Small about some dead bodies, which Small said had been sent from his house to the doctor's in Edinburgh; that Durrand rose up, seized Small, threw him down, twisted his neckcloth round, and struck him violently on the head with a bottle,

which immediately occasioned his death ; that neither of the other prisoners took part in the affray, except Henderson, who, when the struggle began, put out the candle ; that the body was taken down to the cellar, and the money divided, and the corpse afterwards thrown over the pier. So far the case was distinctly proved, and Lords Meadowbank and Mackenzie considered the guilt of Durrand established ; though, as there was no clear evidence of the murder having been pre-concerted, they held there was no sufficient case against the other prisoners. Six witnesses also swore that Emily Sutherland, the servant-girl, was in Durrand's service at that time ; on the other hand eight witnesses swore that she was not there at that time, and did not come for a twelvemonth afterwards ; and four witnesses, who however were all relations of Mrs. Durrand, deposed that she was also absent on the night in question. To complete the embarrassment, the prisoner Jamieson in his declaration *confessed the crime*, and told the story in nearly the same terms as Farquhar. The prisoner Durrand confessed in his declaration that Emily Sutherland was his servant at the time in question ; and the prisoner Henderson declared that Mrs. Durrand *was* in the house at that time. With such contra-

dictory evidence, the prosecutor declined to ask for a conviction; but the impression of the Court was that Durrand was really guilty, and that the *alibi* was got up by fixing real occurrences at another time on the day of the murder, and in this opinion they were supported by the great authority of Baron Hume on reading the evidence*.

The following judicious observations on the subject of this particular defence, from the pen of an able writer on the Criminal Law of Scotland, are deserving of notice :—“ After all, the jury are frequently reduced to the difficult and painful duty of weighing the testimony on the one side against that on the other; and in doing so it is their duty, on the one hand, to recollect that the presumption of law as well as of justice is against the prosecutor, and therefore that if the evidence on both sides is equal, or nearly so, they should incline to the side of mercy; and on the other, how much more easy it is to get up a false story of *alibi*, where the whole to be proved is the presence of the prisoner at a particular place at a particular time, than a false account of all the minute par-

* Allison's Principles of the Criminal Law of Scotland, p. 84.

ticulars relating to so many different matters, which is necessarily implied in the proof of a false charge against a prisoner*.”

* Allison's Practice of the Criminal Law of Scotland, p. 626.

CHAPTER IV.

INCULPATORY CIRCUMSTANTIAL EVIDENCE.

PART II.

EXTRINSIC AND MECHANICAL FACTS.

INCULPATORY circumstances of an extrinsic and mechanical nature, are such as are derived from the physical peculiarities and characteristics of persons and things,—from facts apparently independent of moral indications. Such facts are intimately related to, and as it were dovetail with the *corpus delicti*; and they are the links which establish the connexion between the guilty act and its invisible moral origin. It is impossible even to classify, and still less to attempt an enumeration of, evidentiary facts of the kind in question; but it may be interesting and instructive, by way of illustration, to advert to some of the principal heads of evidence of this kind, and to some remarkable cases which have occurred in the records of our criminal jurisprudence.

The principal facts of circumstantial evidence,

of an external and independent character, relate to questions of identity; first of person, secondly of things, and thirdly of time : but there must necessarily be a vast number of isolated facts which admit of no classification.

SECTION I.

IDENTITY OF PERSON.

It might be concluded by persons not conversant with judicial proceedings, that personal identification is seldom attended with serious difficulty; but such is not the case. Illustrations are numerous to show that what are supposed to be the clearest intimations of the senses may be fallacious and deceptive. Hence the particularity, and, as unreflecting persons too hastily conclude, the frivolous minuteness of inquiry by professional advocates as to the *causa scientiæ* in cases of controverted identity, whether of persons or of things.

Family likeness has often been insisted upon as a reason for inferring parentage and identity. In the Douglas case Lord Mansfield said: "I have always considered likeness as an argument of a child's being the son of a parent; and the

rather, as the distinction between individuals in the human species is more discernible than in other animals ; a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things ; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action *.” It is well known that shepherds readily identify their sheep, however intermingled with others ; and in the case of Peter Oliver, before the Court of Justiciary on the 9th of February 1827, a shepherd identified some of his master’s sheep by their features, the wool (which had been tar-marked) having been clipped†. A case occurred not long ago at the Lincoln assizes of the conviction of a gentleman of a capital crime, for which he suffered ; which took place in consequence of his giving his portrait to a youth, which enabled the

* *Collectanea Juridica*, vol. ii. p. 402: London, 1792. Beck’s *Medical Jurisprudence*, p. 371 ; and see the case of *Doe dem. of Day v. Day*, at Huntingdon assizes, 31st July, 1793 ; printed by Butterworth, 1823.

† *Syme’s Justiciary Reports*, vol. i. p. 224.

police, after watching in London for a month, to recognise and apprehend the wretched culprit*.

The preservation of the head and other parts in spirits has led to identification, as in the case of Catherine Hayes and two accomplices, who suffered in 1726 for the murder of the husband of the former ; after having committed the murder, they cut off the head and threw it into a dock near the Horseferry, Westminster, where it was found a few days afterwards, and exposed on a pole in St. Margaret's church-yard†.

The substances used for destroying life have contributed to identification and detection by the preservation of human remains, as in the late case of Mary Ann Burdock, who was executed at Bristol in the month of April 1835, for the murder of Clara King by means of a preparation of arsenic, which was found to have acted as an anti-putrescent, though the corpse had been interred for fourteen months‡.

* *Rex v. Arden*, London Medical Gazette, vol. viii. p. 36.

† Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 73 ; and Celebrated Trials, vol. iv. p. 98.

‡ See printed Report of the Trial ; Annual Register for 1835, p. 283 ; and Transactions of the Provincial Medical and Surgical Association, vol. iii. p. 433.

Peculiarities in the skull and teeth, and in articles found interred with the body, have led to satisfactory recognition, even after the lapse of a very considerable period ; of which a memorable instance occurred upon the trial of Thomas Clewes, before Mr. Justice Littledale at the Worcester spring assizes 1830, for the murder of Richard Hemming, whose body had remained undiscovered upwards of twenty-three years, and was clearly identified by his surviving widow, from the inspection of his skull and shoes, and a carpenter's rule found with the remains *. At Lyons a corpse was disinterred seven years after burial, and identified by the hair and teeth, as also by the coffin ; the remains of the trunk were subjected to chemical examination, and metallic arsenic was reproduced, and other tests indicated that arsenic had been administered in considerable quantity†.

Identification is often satisfactorily established by means of peculiarities in articles of dress, and the correspondence of fragments of garments, written or printed papers, or other articles found in the possession of parties charged with crime,

* See printed Report, *ut supra*.

† Annual Register for 1829, p. 189; London Medical Journal, vol. v. p. 411; and *ibid.* vol. xv. p. 518.

with other portions or fragments connected with the *corpus delicti**.

At the Warwick spring assizes in 1818, before Mr. Baron Garrow, Rebecca Hodges was charged with the crime of arson. The prisoner had been met near the ricks which were set on fire, about two hours after midnight. A part of the combustible matter employed consisted of a piece of unburnt cotton rag found in a tinder-box near the spot, and a piece of a woman's neckerchief found in one of the ricks where the fire had been extinguished. It was deposed that the piece of cotton in the tinder-box was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box. A half neckerchief was taken from the prisoner's bundle ; and from the colour, pattern, and fabric, it was proved that the piece found in the stack and that found in the prisoner's box had belonged to the same square ; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality, (whereas articles of that description were generally sewed with cotton,) the witness clearly inferred that they were the work

* See Mascardus De Probationibus, Conclusio dccccxxxi.

of the same person. The prisoner was capitally convicted*.

In a case of burglary the thief had gained admittance to the house by means of a penknife, which was broken in the attempt, and part left in the window-frame ; the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left. In another case the prosecutor when attacked had in his own defence struck the robber with a key upon the face, and the prisoner's face bore an impression which corresponded with the wards of the key†.

At the Stafford summer assizes 1835, John Mountford was convicted of an attempt to murder, by sending to the prosecutor on the 11th of May preceding a parcel consisting of a tin case, which contained several pounds of gunpowder, so packed as to explode by the ignition of detonating powder, inclosed between two pieces of paper, connected with a match fastened to the bottom and to the lid of the box. It was a conclusive circumstance against the prisoner that

* The Trial of Rebecca Hodges for setting fire to the ricks of Mr. Samuel Birch, etc., before Mr. Baron Garrow at Warwick, 4th April, 1818 ; printed by Sharpe, Warwick.

† Starkie's Law of Evidence, vol. i. p. 498.

underneath the outer covering of brown paper, in which the case and combustible matter had been inclosed, was found a portion of the Leeds Intelligencer of the 5th of July, 1832, the remaining portion of that identical paper having been found in the prisoner's house*. In another case identification was established by the correspondence of the wadding of fire-arms with part of a torn letter found in the prisoner's possession†; and in a case on the Northern circuit where a man was shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad, which corresponded with another part found in the pocket of the prisoner‡.

The following are remarkable cases of the same kind, and referable to the same principle.

William Heath and Elizabeth Crowder were charged at Glasgow, September 1831, with breaking into the Glasgow Bank in Virginia Street, and stealing £6000. The bank was safely locked up on the 24th of December, and it was found to have been broken into when the clerks re-

* Moody's Reports of Crown Cases, vol. i. p. 441.

† Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 39; and Starkie's Law of Evidence, vol. i. p. 498.

‡ Bentham's Rationale of Judicial Evidence, book v. ch. xv. p. 256.

turned on the morning of the 26th, the intervening day having been a holiday. The iron safes had all been forced open. The prisoner Heath had been seen in Virginia Street, more than once, about three weeks before the robbery. On Christmas-day a woman extremely like Elizabeth Crowder rang at the bank door, and repeatedly looked past the servant who opened the door up the stairs. The prisoners came to Glasgow about six weeks before the theft, living together, and left their first lodgings about a fortnight before Christmas for others, in which they lived till Christmas-day, when they finally left them. They frequently went out carrying a box, which they always brought back ; and when at home they were often engaged, with the windows closed, in a noisy work like breaking of iron with hammers. On the day of the theft they were seen in Virginia Street by two witnesses lingering about during the time of Divine service. Heath had repeatedly called at an ironmonger's in Glasgow for some weeks previously to obtain blank keys, and to get them bored and altered ; and that ironmonger identified a fragment of a key, found in the lock of the safe of the bank, as what he had made for Heath. On the dresser of the lodgings which they occupied in Glasgow were found

circles, such as would have been produced by making keys similar to one of which a fragment was found in the safe of the bank which was robbed; and the catches of a vice found in Crowder's house in London coincided with the markings on a board in Heath's lodgings in Glasgow. On the day after the theft the prisoner Heath set off in the coach to Edinburgh under a feigned name, and was traced in the mail from Edinburgh to London. On the 31st of December he was found at a jeweller's shop in Dover exchanging two Scotch notes for French gold; and to the mate of the steam-boat between Dover and Calais a person resembling the prisoner Heath tendered a twenty-pound Scotch note. In their declarations both prisoners refused to answer any questions. Upon this evidence Heath was convicted and executed, and Crowder escaped, by a verdict finding that she had previous knowledge of the theft, but had no actual participation in it,—a verdict which the Court justly considered as equivalent to 'not proven*.'

Gomez Palayo, a Spaniard, was tried at the Liverpool quarter sessions on the 28th of October 1836, for having occasioned a grievous injury to an officer of the post-office, by means of

* Allison's Principles of the Criminal Law of Scotland, p. 318.

several packets containing fulminating powder, put by him into the post-office, one of which exploded in the act of stamping. The letters, which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havannah and Matanzas, who appeared to be the objects of the writer's malignant intentions. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters into the post-office on the evening of the 22nd of that month, the explosion having occurred on the 24th ; and there was found upon his person a seal which corresponded with the impression upon the letters, which circumstance (though there were other strong facts) was justly considered as conclusive of the prisoner's guilt, and he was accordingly convicted and sentenced to two years' imprisonment*.

The cases are innumerable in which identification has taken place by means of impressions of nails, patches, abrasions and other peculiarities made in the clay or soil during or before or after the commission of crime. At Warwick spring assizes, 1816, Isaac Brindley was convicted

* Annual Register for 1836.

of the murder of Ann Smith. The deceased had struggled much, but was overpowered and drowned. Impressions were found in the clay, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material; but the patch was not set on straight, the ribs of the patch meeting the hollows of the cords of the garment into which it had been inserted. These circumstances corresponded exactly with the prisoner's dress and materially influenced the jury in convicting him*. In the case of Tyler and Sewell, convicted at the Aylesbury spring assizes 1830 of the murder of Benjamin Tyler, there was found the print of corded breeches, the deceased having worn smooth plush breeches; and one of the prisoners, who wore ribbed breeches, was afterwards seen removing marks of road dirt from his breeches' knees†. In a trial for murder at the Old Bailey a piece of cloth was produced which was stained with blood, and matched with a rent in the prisoner's trowsers; it had been picked up near the spot where the deceased was found, and where there were marks of struggling. The stitches in both

* This is probably the same case as that mentioned in Starkie's Law of Evidence, vol. i. p. 498.

† Annual Register for 1830, p. 320.

parts of the garment were sewn with silk. A tailor gave a strong opinion that the sewing in each part had been done by the same hand; and a cloth-factor deposed to his belief that the two pieces were of the same piece of cloth*.

On the trial of James Nisbett, at Maidstone summer assizes 1820, for the murder of Thomas Parker and his housekeeper, it appeared that some persons after robbing the house of the deceased had set fire to it, so that the body of Mr. Parker was almost entirely consumed; but the left leg remained perfect, and the foot had on a shoe which, having been originally too small, had been burst in tying on, which circumstance was proved by the person who made the shoe†.

John Wales was tried at the Glasgow spring circuit, 1828, for breaking into a shop between a Saturday night and Monday morning, and stealing about £30 in silver. There was found in the prisoner's lodgings, when apprehended on the Monday morning, a good deal of silver, comprising an old dollar corresponding with an old coin of the same description which had been carried off, which of course could not be identified. But there was found in the ashes of the grate in the

* *Rex v. William Johnson*, Annual Register for 1833, p. 1.

† *Celebrated Trials*, vol. vi. p. 443.

prisoner's room the iron heel of a shoe, which corresponded in form, size, and the number of holes, to the iron of a shoe which was left in the shop broken into. The morning of the Monday was wet, and the prisoner's stocking-soles were wet and dirty, though he was in bed and said he had not been out that morning. The prisoner was convicted and transported for life*.

In the following case, although the property found upon one of the prisoners could not be positively identified, yet the circumstances could leave no reasonable doubt that it had been stolen from the prosecutor's premises, and the state of the other prisoner's dress left as little doubt of his personal co-operation in the crime. At Glasgow spring circuit, 1828, John M'Kechie and Alexander Tolmie were tried for stealing a quantity of soap from the soap-boiling premises of Johnston and Co. near Glasgow, which were broken into on a Saturday night by making a hole in the wall, and 120lbs. of yellow soap abstracted. On the same night at 11 o'clock the prisoners were met by the watchman near the centre of the city, one of them having 40lbs. of yellow soap on his back, and the other with his

* Allison's Principles of the Criminal Law of Scotland, p. 322.

clothes greased all over with the same substance. The prisoners on seeing the watchman attempted to escape, but they were seized. The owner declared that the soap was exactly of the same kind, size, and shape with that abstracted from his manufactory, but as it had no private mark, it could not be identified more distinctly. One of the prisoners had formerly been a servant about the premises, and both in their declarations alleged that they got the soap in a public-house from a man whom they did not know. The prisoners were convicted, and transported for seven years*.

The means of identifying the footsteps of persons who have committed crime is often afforded by the snow, the dew, and the rain. In the case of William Spiggott and others the footsteps of some of the prisoners were traced to their own houses from that of Mr. Powell, who was murdered at Glenareth in Carmarthenshire on the 30th of March 1770†.

Circumstances sometimes extraordinarily con-

* Allison's Principles of the Criminal Law of Scotland, p. 322.

† Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 37; and Celebrated Trials, vol. iv. p. 446; and see the cases of Swan and Jefferys, Thornton, and Smith and others, *infra*.

tribute to identification, by confining suspicion and consequently limiting the range of inquiry to a class of persons.

In the case of Elizabeth Jefferys and John Swan, the former the niece and the latter the servant of Mr. Jefferys, of Walthamstow, who were convicted of his murder in 1750, an alarm had been made from within the house ; but, nevertheless, suspicion fell upon the domestics from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than domestics*.

At the Glasgow spring circuit, 1828, William Young was tried for breaking into a workshop about six o'clock in the evening, and stealing £10 from a locked drawer. The effraction had been accomplished in a peculiar way, and evidently by a person well acquainted with the premises. A fierce watch-dog, left in charge of the premises, had not been heard to make any noise by the neighbours, although he would in all probability have seized and torn a stranger. The prisoner, who had formerly been a servant in the

* State Trials, vol. xviii. p. 1193 ; and see Mascardus De Probationibus, Conclusio cclxxii.

shop, and was well acquainted with the premises and familiar with the dog, was seen by a watchman in a neighbouring street at five o'clock ; and there was found in his chest £9 18s. in silver, including a crooked 6d., which the owner thought was one which she had long possessed, or at least exactly resembled it. He was convicted and transported*.

The conviction of three ruffians, who a few years ago murdered an Italian boy for the purpose of selling his corpse, was owing partly to the proof that one of them had given away some white mice, which there was every reason to believe had belonged to the unfortunate lad†.

In the case of George Hebner, a sailor, who was found hanging to the top of a bedstead in a garret of a house of ill fame, kept by a woman named Hughes, the manner in which the hands of the deceased were tied behind his back and his handkerchief drawn over his face, repelled the possibility of suicide ; and upon examining the rope it was found to have been fastened by what is termed a sailor's knot ; in consequence

* Allison's Principles of the Criminal Law of Scotland, p. 323 ; and see *Rex v. Butler*, Old Bailey, June 18, 1829, Annual Register for 1829, p. 314.

† *Rex v. Bishop*, May and Williams, Old Bailey, December 1831 ; Sessions' Papers, and Annual Register, for 1831, p. 316.

of which circumstance a sailor named Richard Ludman was apprehended, and he and the woman were convicted of the murder and executed*.

The following are cases of the same kind, in which scientific testimony had the effect of restricting suspicion and inquiry to a small number of persons.

Mrs. Humphreys was convicted at the Aberdeen autumn circuit in 1830 of poisoning her husband, by pouring sulphuric acid down his throat. It was clearly proved that the deceased died of this poison, and the administration was brought home to the prisoner in the following singular manner. The only inmates of the house were the deceased, the prisoner, and a maid-servant. The deceased got a little intoxicated one evening at a drinking party in his own house; and after his friends had all left, and the street-door was barred inside, he went to bed, in perfect health, and soon fell fast asleep: but he had slept scarcely twenty minutes, when he suddenly awoke with violent burning in his throat and stomach, and he expired in great agony toward the close of the second day. Now sulphuric acid, when it occasions the vio-

* Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 44.

lent symptoms observed in this instance, invariably excites them in a few seconds, if not during the very act of swallowing. It was therefore impossible that the man could have received the poison at the time he was drinking with his friends; and as he knew he had not taken anything else afterwards, and it was fully proved that he had been asleep before his illness suddenly began, it followed that the acid must have been administered after he fell asleep, the accomplishment of which was rendered easy by a practice he had of sleeping on his back with his mouth wide open. But, after he gave the alarm, the door was found barred, as when he went to bed; consequently no one could have administered the poison except his wife or servant, and it was satisfactorily proved that no suspicion could attach to the latter. Such were the principal circumstances which led to the inference that the wife was the person who administered the poison*.

William Muir was tried and convicted at Glasgow in 1812 of poisoning his wife. In the course of the day on which she was taken ill she was visited by a farmer in the neighbourhood,

* Christison on Poisons, p. 80; and Edinburgh Medical and Surgical Journal, pp. 35, 298.

who had studied physic a little in his youth. He learned from her that she had breakfasted on porridge a short time before she felt herself ill, and that she suspected the porridge to have been poisoned. He immediately procured the wooden bowl in which the cottagers of Scotland keep the portion of meal used each time for making the porridge, and finding in it some meal with shining particles interspersed, he wrapped a sample in paper, and took the proper measures for preserving its identity. He then also procured a sample from the family store in a barrel. The two parcels were produced by him on the trial; and from experiments made in court Dr. Cleghorn was enabled to declare that the meal from the bowl contained arsenic, and that the meal from the barrel did not. These facts, beside proving, next to a certainty, that the woman had taken arsenic in the porridge, likewise, in conjunction with other slight moral circumstances, established the fact that the poison had been mixed with the meal in the house, and on the morning when the deceased fell ill, before any stranger entered the house*.

Offenders have occasionally been identified, as connected with crimes committed by means of

* Christison on Poisons, p. 74.

sulphuric or other acids, by the discovery, by chemical means, of spots or stains produced by the same deleterious agents upon their own clothes, furniture, or premises*.

As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion†. John Haines was indicted January 12th, 1799, for shooting at three Bow-street officers, who, in consequence of several robberies having been committed near Hounslow, were employed to scour that neighbourhood. They were attacked in a post-chaise in the evening of the 10th of November by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that from the flash of the pistols he could distinctly see that it was a dark brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders, and such that he could select him out of fifty horses, and that he had seen the horse since at a stable in Long

* *Rex v. Euphemia Lawson or M'Millan*, Syme's Justiciary Reports, vol. i. p. 288; *Rex v. Humphreys*, *ut supra*, p. 140.

† *Médecine Légale*, tom. i. p. 28.

Acre. He also perceived by the same flash of light that the person at the side glass had on a rough shag brown great-coat*. Similar evidence was given upon a trial for high treason†.

Some extraordinary cases have occurred of mistaken personal identity ; but such cases have not been frequent in the English courts. The *causa scientiæ* ought to be scrutinized with peculiar vigilance wherever identification is made matter of question. The case of Richard Coleman, which has been mentioned in a former part of this Essay, was one of mistaken identity. There is no doubt that the injured party was sincere in her belief that the prisoner was one of the persons by whom she had been maltreated ; and there is as little doubt that her impression was in part grounded upon the fact, that one of the malefactors at the time of the outrage called another of them by the prisoner's name.

In the case of Martin Clinch and James Mackley, who were convicted at the Old Bailey sessions in 1797, before Mr. Justice Grose, of the murder of Syder Fryer, Esq., and executed, the identity of the prisoners was positively sworn to

* Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 144.

† Rex v. James Byrne, State Trials, vol. xxiii. p. 819.

by a lady who was in company with the deceased at the time of the robbery and murder ; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which Clinch and Mackley were executed*.

A young gentleman, articled to an attorney in London, was tried at the Old Bailey on the 17th and 19th of July 1824, on five indictments for different acts of theft. A person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewellery and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an *alibi* was as clearly and positively established ; and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person

* Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 144.

resembling the prisoner, and those persons proved that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. The prisoner was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutors had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which conviction had taken place*.

Not many months before the last-mentioned case a respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighbourhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. The counsel for the prisoner called a genteel young woman, to whom the prisoner paid his addresses, who gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval another young man, of the name of Greenwood, who awaited his trial on a capital

* *Rex v. William Ramsden Robinson*, Sessions Papers during the Mayoralty of the Right Hon. Robert Waithman, pp. 423, 440, 443.

charge of felony, was introduced and placed by the side of the prisoner. The prosecutor was again put up into the witness-box and addressed thus: "Remember, sir, the life of this young man depends upon your reply to the question I am about to put, Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when beholding two men so nearly alike he became petrified with astonishment, dropped his hat, and was speechless for a time, but at length declined swearing to either. The young man was of course acquitted. Greenwood was tried for another offence and executed; and a few hours before his death acknowledged that he had committed the robbery with which the other was charged*.

SECTION 2.

IDENTIFICATION OF ARTICLES OF PROPERTY.

The identification of articles of property, like that of the human person, is capable of being

* Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 143, where, and in the London Medical Gazette, vol. viii. p. 36, in a lecture by Professor Amos, and in Beck's Medical Jurisprudence, p. 372, etc., see some other cases of mistaken identity.

established by means of numberless circumstances, which it is not possible to classify or enumerate. Most of the cases of identification which have been enumerated in the foregoing section are in fact cases of identification of articles of property, applied inferentially to the establishment of personal identity; and they sufficiently illustrate, without repetition, the difficulties which attend investigations of this kind. It may be added however, as a general rule, that it is of the greatest importance in all cases, where witnesses speak to questions of identity, to sift with extreme rigour the *causa scientiæ*. The following cases, as well as others already mentioned, show how peculiarly liable even well-intentioned witnesses, who speak to facts of this particular kind, are to error and misconception.

At the spring assizes, 1830, at Bury St. Edmunds, Robins Jacob, a respectable farmer occupying 1200 acres of land, was indicted for a burglary and stealing a variety of articles. Amongst the articles stolen were a pair of sheets and a cask, which were alleged to have been shortly afterwards found in the possession of the prisoner, and were positively and unhesitatingly sworn by the witnesses for the prosecution to be those stolen. The sheets were identified by a particular stain,

and the cask by the mark " P. C. 84 " inclosed in a circle on one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. This was proved by numerous witnesses, whose respectability left no doubt of the truth of their evidence. In addition to this it was proved that the prisoner purchased his cranberries of a tradesman in Norwich, whose casks were all marked " P. C. 84 " inclosed in a circle, precisely as the prosecutor's were, the letters P. C. being his initials, and that the cask in question was one of them. In summing up the judge remarked that this was one of the most extraordinary cases ever tried ; and that it certainly appeared that the witnesses for the prosecution were mistaken : the prisoner was acquitted*.

A man named Webster was tried on the Northern circuit in Scotland for housebreaking and theft. The girl whose chest had been broken open, and whose clothes had been carried off,

* Annual Register for 1830, p. 50.

swore to the only article found in the prisoner's possession and produced, viz. a white gown, as being her property. She had previously described the colour, quality, and fashion of the gown, and they all seemed to correspond with the article produced. The housebreaking being clearly proved, and the goods, as it was thought, distinctly traced, the case was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. This appeared rather a whimsical proposal, but it was agreed to by the Court; when, to the surprise of every one present, it turned out that the gown which the girl had sworn was hers,—which corresponded with her description, and which she said she had used only a short time before,—would not fit her person. She then examined it more minutely, and at length said it was not her gown, though almost in every respect resembling it. The prisoner was of course acquitted; and it turned out afterwards that the gown produced belonged to another woman, whose house had been broken into about the same period by the same person, but of which no evidence had at that time been produced*.

* Burnett on the Criminal Law of Scotland, p. 558. State Trials, vol. xix. p. 494.

A case occurred at the Stafford assizes a few years ago, where a youth was convicted of stealing a pocket-book containing a 5*l.* note. The prosecutrix left home to go to market in a neighbouring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which on rising up she found to be the prisoner's. Having afterwards purchased some articles at a grocer's shop, on searching for her pocket-book in order to pay for them, she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which the prosecutrix identified as that which she had lost, but it contained no money. Several witnesses proved that the prisoner had long possessed the pocket-book; but some discrepancy in their evidence in other respects led to the suspicion that the defence was a fabricated one, and the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the continuance of the assizes two men, who were mowing a field of oats through which the path lay by which the prosecutrix had gone to market, found in the oats close to the path a black pocket-book containing a 5*l.* note. The men took the pocket-book and money to the

prosecutrix, who immediately recognised them, and the committing magistrate dispatched a messenger with the articles found and her affidavit of identity to the judge at the assize town. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her handkerchief, and had clearly been mistaken as to the identity of the pocket-book produced upon the trial*.

Allied to evidence of identity is that of handwriting, which has given rise to some curious cases of conflicting circumstantial testimony. Tuition by the same preceptor, employment in the same place of business, as well as designed imitation, are often causes of great similarity in writing. Men in certain professions sometimes adopt peculiarities of character ; and there are peculiarities indicative of age, infirmity, and sex†.

Handwriting is sometimes very successfully imitated. In the trial of Carsewell at Glasgow, in May, 1791, for the forgery of bank-notes, one of the banker's clerks, whose name was on the forged note, swore distinctly that it was his

* *Rex v. John Carter ; ex relatione.*

† See the trial of the Rev. Robert Bingham, on a charge of sending an incendiary letter, at Horsham spring assizes, 1811 ; and *Rex v. the Hon. Mr. Justice Johnson*, State Trials, vol. xxix. p. 81.

handwriting, while he spoke hesitatingly with regard to his genuine subscription*.

Handwriting is usually proved by the testimony of persons who have seen the party write. The following extract from a learned judgement by Sir John Nicholl embodies and condenses many instructive observations upon this kind of evidence: "This Court has often had occasion to observe, that evidence to handwriting is at best, in its own nature, very inconclusive; affirmative, from the exactness with which handwriting may be imitated; and negative, from the dissimilarity which is often discoverable in the handwriting of the same person under different circumstances. Without knowing very precisely the state and condition of the writer at the time, and exercising a very discriminating judgement upon these, persons deposing, especially, to a mere *signature* not being that of such or such a person, from its dissimilarity—howsoever ascertained or supposed to be—to his usual handwriting, are so likely to err, that negative evidence to a mere subscription, or signature, can seldom, if ever, under ordinary circumstances, avail in proof, against the final authenticity of the instrument to which that subscription, or signature, is

* Burnett on the Criminal Law of Scotland, p. 502.

attached. But such evidence is peculiarly fallacious, where the dissimilarity relied upon is not of that general character, but merely particular letters ; for the slightest peculiarities of circumstance or position,—as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined,—nay, the materials, as pen, ink, &c., being different at different times,—are amply sufficient to account for the same *letters* being made variously at the different times by the same individual. Independent, however, of anything of this sort, few individuals, it is apprehended, write so uniformly, that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person*.”

Evidence of handwriting, by the comparison of controverted writing with the admitted or proved writing of the party, is in general inadmissible by the common law of England, unless where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document†. But the

* Robson v. Rocke, Addams's Reports, vol. ii. p. 79 ; and see Rex v. John Hawkins and George Simpson, The Theory of Presumptive Proof, p. 94.

† Doe dem. of Perry v. Newton, Neville and Perry's Reports, vol. i. p. 1.

evidence of persons accustomed to the critical examination of handwriting, (as engravers and inspectors of franks,) who, without any previous knowledge of a person's handwriting, profess to be able to determine by comparison of the disputed with his genuine writing whether a signature be genuine or not, and also from the general character and appearance of handwriting whether it be written in a natural or feigned hand, appears to be an exception to the rule* ; though such evidence is now justly considered to be of little weight, and attempts to introduce it receive little encouragement†. In a case in Doctors' Commons the learned judge, Sir John Nicholl, repudiated the common objection of painting or touching, as a reason for inferring fraud, saying that there could scarcely be a less certain criterion, and peremptorily declined the offer of a glass of high powers said to have been used by the professional witnesses, observing in substance, that glasses of high powers, how-

* *Goodtitle v. Revett*, Term Reports, vol. iv. p. 497 ; *Rex v. Cator*, *Espinasse's Reports*, vol. iv. p. 117 ; *Rex v. Johnson*, *State Trials*, vol. xxix. p. 81 ; *Saph v. Atkinson*, *Addams's Reports*, vol. i. p. 162 ; *Beaumont v. Perkins*, *Phillimore's Reports*, vol. i. p. 78.

† *Gurney v. Langlands*, *Barnwall and Alderson's Reports*, vol. v. p. 330 ; *Constable v. Steibel*, *Haggard's Reports*, vol. i. p. 56 ; *Young v. Brown*, *ib.* vol. i. p. 569 ; *Robson v. Rocke*, *ut supra*.

ever fitly applied to the inspection of *natural* subjects, rather tended to distort and misrepresent than to place *such* objects in their *true* light; especially when used (their ordinary application in the hands of prejudiced persons) to confirm some theory or preconceived opinion*.

The watermark in writing-paper, and the internal contents of written documents, frequently afford the means of detecting forgery and fraud†.

SECTION 3.

VERIFICATION OF TIME.

The verification of time is occasionally an important element in criminal cases, and it has sometimes been fixed in an extraordinary manner. A case occurred in Warwickshire some years ago, where a clock was stopped at the moment of breaking into a house by the slamming of a door. An Irish pedlar, Thomas Tole, was convicted at the Warwick summer assizes, 1812, of the murder near Birmingham of Michael

* Robson *v.* Rocke, *ut supra*; and see State Trials, Index, voce 'Handwriting'; *Traité sur la Preuve par Comparaison d'Écritures*, par L. P. Vallain, Paris, 1761; and *Mémoire en Réponse à l'Ouvrage de M. Vallain*.

† See Crisp *v.* Walpole, Haggard's Reports, vol. ii. p. 531.

McComesky, who had left Ireland about a fortnight before, and had purchased some Irish linen at Newcastle, where he met with the prisoner. They were traced from Lichfield to Minworth, and had been disposing of Irish linen at several places ; the deceased had two packs of linen and the prisoner one. The prisoner and the deceased went together from the high-road into a lane, in which about half an hour afterwards the deceased was found dead, with several wounds about his head ; his body was warm, and blood was still issuing from the wounds, which appeared to have been inflicted with a large stone, which had been recently taken from its socket. The prisoner was met by several persons within a few hundred yards of the spot where the deceased was found, and was soon afterwards apprehended within a few miles of the place, carrying three bundles of cloth, which, as well as his clothes, were stained with blood. In the pockets of the deceased were found only two or three shillings in halfpence, but the prisoner had several pounds in Bank-of-England and other notes. The prisoner was executed*.

* See the case of Alexander MacLennan, Inverness, September, 1830, Allison's Principles of the Criminal Law of Scotland, p. 82, where a similar fact is mentioned.

In the case of Abraham Thornton, of which an account is given in the next chapter, the defence was an *alibi* ; and it was essential accurately to fix the times at which the prisoner had been seen by the several witnesses after the fatal event which was the subject of investigation. This object was satisfactorily effected by comparing the various time-pieces referred to, with a public clock, and reducing the times as spoken to by the witnesses to the same common standard.

Many other cases might be collected, but it would be useless to accumulate illustrations. The relevancy of facts such as those which have been mentioned will be the subject of consideration in a future part of this Essay.

CHAPTER V.

EXCULPATORY CIRCUMSTANTIAL EVIDENCE.

THE truth of alleged circumstances of presumption may be denied, or their relevancy may be contested; but supposing them to be established, they may be repelled by countervailing or invalidating circumstances; to every allegation of the existence of which justice requires that dispassionate and candid consideration be given, before the balance of moral probabilities be struck. A fact of this kind occurred in the case of Eliza Fenning, who was executed in 1815, for poisoning Mr. Turner and three members of his family. The prisoner was the prosecutor's cook, and had herself partaken of and severely suffered from the poisoned food; but of this important circumstance no notice was taken in the Recorder's charge. There may be no reason to doubt the reality of the poisoning*, but the chemical examination and testimony were imperfect†; there was an absence of

* Christison on Poisons, p. 291.

† Beck's Medical Jurisprudence, p. 753; Smith's Analysis of Medical Evidence, p. 210; Sessions Papers, 1815; The

any sufficient apparent motive, and the evidence to implicate the prisoner is considered to have been slight and unsatisfactory*.

A circumstance of the same kind occurred on the before-mentioned trial of John Fitter, a shoemaker, at the Warwick autumn assizes, 1834, for the murder of Margaret Webb, an aged female. The leathern apron of the accused had several circular marks, made by paring away superficial pieces; and it was supposed that they had been removed as containing spots of blood; but it was satisfactorily proved that he had cut them off for plasters for a neighbour†.

It would be endless to attempt an enumeration of facts of this class, which are almost infinitely diversified; for, as inculpatory facts may be alleged falsely, the possibility is necessarily implied of the existence of corresponding exculpatory facts. Happily while circumstantial evidence frequently leads to the conviction of the guilty, it also often affords the means of clearing

Important Results of an elaborate Examination, into the mysterious Case of Elizabeth Fenning, etc., by John Watkins, LL.D.

* See Smith's Hints for the Examination of Medical Witnesses, p. 136; where it is stated that a person upon whom suspicion fell at the time has since confessed that he committed the crime.

† See *supra*, p. 112.

the innocent. The following case presents an interesting illustration of this observation. A man of the name of Whalley was indicted at the York spring assizes, in 1821, for administering arsenic to Martha King, who was pregnant by him. The woman swore that the prisoner, after twice trying, but in vain, to prevail on her to take drugs for the purpose of procuring abortion, sent her a present of tarts, of which she ate one and a half; that in half an hour she was seized with symptoms of poisoning with some irritant poison, and that she continued ill for a long time after. The medical gentleman who conducted the investigation, found arsenic in the tarts that remained untouched, and likewise in some matter which was vomited in his presence, after the administration of an emetic, as well as in other vomited matters which were preserved for him between his first and second visits. Her appearance however did not correspond with the complaints she made of her sufferings, and on careful investigation the following inconsistencies were detected: 1. She said she felt a coppery taste in the act of eating the tarts, a taste which arsenic does not possess; 2. From the quantity of arsenic in the tarts which remained, she could not have taken above two grains, while, after re-

peated acts of vomiting, the alleged matter subsequently preserved contained nearly fifteen grains ; 3. The matter first vomited contained only one grain, while the matter alleged to have been vomited subsequently contained fifteen grains ; 4. The time at which these fifteen grains were alleged to have been vomited was not till between two and three hours after the symptoms began ; in which case the symptoms would before that time have been in all probability violent. The prisoner was acquitted ; and the prosecutrix, and another woman who corroborated her deposition, afterwards admitted that they had entered into a conspiracy to impute the crime to him, because he had deserted her, on finding that she was too intimate with other men*.

The following cases show the manner in which strong *prima facie* circumstances of guilt may be rebutted by circumstances leading to a contrary conclusion, and in which the criminatory and exculpatory circumstances are sometimes so nicely balanced as to render it impossible to arrive at any certain or satisfactory conclusion, much less at that of legal guilt.

William Barnard was tried at the Old Bailey sessions May 17, 1758, for writing several threat-

* Rex v. Whalley, Christison on Poisons, p. 95.

ening letters to the Duke of Marlborough. The first of them required the Duke to meet the writer on Saturday at ten in the morning at a particular spot in Hyde Park ; where His Grace accordingly went on horseback, unattended, with pistols before him and without a great coat, so that his star was easily to be seen ; but he had a friend in the Park who kept at a distance. When the Duke came up to the tree he saw nobody either at or near it, whom he could suspect to be the person ; and after remaining some time he rode away. When he came to Hyde Park corner and turned his horse, he saw a person standing loitering and looking at the water over the bridge, within twenty yards of the tree ; upon which he rode gently back, and passed by the person, expecting him to speak to him, but was disappointed. He passed a second time ; and the person still taking no notice, His Grace bowed and asked if he had not something to say to him ; to which he replied, " No ; I don't know you." His Grace then said, " I am the Duke of Marlborough ; now you know me I imagine you have something to say to me." He replied, " No, I have not ;" and His Grace rode away. A day or two after the Duke received a second letter, acknowledging " his punctuality as to the

time and place of meeting," noticing the pageantry of being armed, and the ensign of his order, stating that he "needed no attendant," and appointing another meeting at 11 o'clock on the following Sunday in the west aisle of Westminster Abbey, "where," he added, "your sagacity will point out the person, whom you will address by asking his company to take a turn or two with you." The Duke attended at the hour and place appointed, and walked some minutes in the Abbey before he saw anybody that he suspected; he then saw the same person whom he had seen in Hyde Park come in with a man who had the appearance of a substantial tradesman, and go about looking at the monuments. After some time the stranger went into the choir, and the person whom he had seen before turned back and came towards the Duke. The Duke asked him if he had anything to say to him, or any commands for him, and he replied, "No, my Lord, I have not:" the Duke then said, "Sure you have;" but he replied again, "No, my Lord." The Duke then left him, and as he continued to walk up and down one side of the aisle His Grace walked up and down the other, to give him a little more time, but he did not speak. The Duke had several persons disguised in the Abbey, who

were to have taken up the person he was to meet if the signal had been given. Soon after this His Grace received a third letter, which stated the writer's conviction that "he had a companion on Sunday," and adding, "you will see me again soon, as it were by accident, and may easily find where I go to; in consequence of which, by being sent to, I shall wait on Your Grace." About two months afterwards the Duke received another letter in a different hand, which stated that "the writer had reason to believe that the son of one Barnard in Abingdon Buildings, Westminster, was acquainted with some secrets that nearly concerned his safety, and that his father was *then* out of town, which would give him an opportunity of questioning him more privately." About ten days after the receipt of this letter, the Duke sent a person to tell Mr. Barnard that he desired to speak with him; and Barnard sent word by the messenger that he would wait upon His Grace on the Thursday morning following at half after ten. At the time appointed Mr. Barnard accordingly went; and the Duke, who recognised him as the person he had seen in the Park and the Abbey, took him into a room, and having shut the door, asked him, as he had done at their former meetings, whether he had anything to say

to him ; to which he answered he had not. The Duke then recapitulated the letters, and Barnard listened with attention and surprise, but without any appearance of fear. The Duke observed that it seemed strange to find such letters written with the correctness of a scholar ; to which Barnard replied, that a man might be very learned and very poor. The Duke then showed him the fourth letter, in which his name was mentioned, upon which Barnard said, " It is very odd ; my father was *then* out of town." This speech the Duke thought remarkable ; because, though Barnard said his father was *then* out of town, the letter was without a date. The Duke said that, if he was innocent, it behoved him more than His Grace to discover the writer of the letters, especially of the last ; upon which he gave the Duke a smile and went away. Barnard urged in his defence, that on the Sunday morning mentioned in the first letter to the Duke, his father ordered him to go to Kensington to the solicitor of the turnpike, to know whether the treasurer of the turnpike had not paid some money for his use : that in consequence of this order he did go to Kensington, saw the solicitor of the turnpike there, dined with his uncle at his house at Kensington, in company with several other persons,

to whom he related the circumstance of the Duke's coming up to him in Hyde Park, and asking if he had anything to say to him. This was attested by Barnard the father, who gave him orders to go to Kensington, by the person to whom he went, by his uncle with whom he dined, and by several others that were at the same table. As to his being in the Abbey, he proved that Mr. Greenwood, a relation, being at breakfast with him on the Sunday mentioned in the second letter, at his father's, where he had slept the night before, desired him to get himself dressed and go with him into the Park ; that he did not comply till after much solicitation, and that when they came to the end of Henry the Seventh's Chapel, Mr. Barnard would have gone into the Park without going through the Abbey, if Mr. Greenwood had not insisted on the contrary, as he had never seen General Hargrave's monument ; and this Mr. Greenwood was the person whom the Duke says he saw come into the Abbey with Mr. Barnard. As Barnard had told Greenwood the strange circumstance of the Duke's speaking to him in the Park, Greenwood as soon as he saw the Duke, whom he knew, told Barnard who he was ; for Barnard, being near-sighted, had not

seen him. Mr. Greenwood observing the Duke to come up to him and pass him several times, supposed he had a mind to speak to Mr. Barnard, but would not do it till he was alone, and for that reason he left him and went into the choir, to give him an opportunity of doing so. These facts were attested by Mr. Greenwood, Mr. Barnard could not have appointed meetings on these days, in consequence of his having business which at those times would call him to the places mentioned, because he did not know of his going either to the Park or the Abbey till the very day on which he went. Mr. Barnard also proved, by unexceptionable witnesses, that he had mentioned the circumstances of the Duke's meeting and speaking to him both in the Park and in the Abbey openly among his friends and acquaintance on the days when they happened, and frequently afterwards; that his father was in a reputable and profitable business, in which his son was likely to succeed him. It was also proved by several persons of the highest character, particularly Dr. Markham, the then master of Westminster School, that the son was in plentiful circumstances; and not in any exigence which might urge him to obtain money at such a risk, and that his conduct

had been irreproachable, and his fidelity often tried*.

Of all kinds of exculpatory defence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive, since it excludes the possibility of the truth of the accusation. A defence of this nature is often entertained with distrust and suspicion, because it is easily concocted, and frequently resorted to falsely. It is essential to the satisfactory establishment of an *alibi*, that it should cover the whole of the time of the transaction to which it relates, so as to render it impossible that the prisoner could have committed the act ; it is not sufficient that it renders his guilt improbable. A defence of *alibi* was disregarded, because all that the prisoners offered to prove was that they were in bed on the night in question at twelve o'clock, and were found in bed next morning after the arson with which they were charged had taken place ; the distance being two miles, so that they might have risen, committed the deed and returned to bed†.

* Selections from the Gentleman's Magazine, vol. iii p. 322 ; Sessions Papers, 1759 ; Smollett's History of England, vol. vi. p. 489, n. ; Starkie's Law of Evidence, vol. i. p. 511.

† Rex v. William and Alexander Fraser, Allison's Practice of the Criminal Law of Scotland, p. 625.

The credibility of an *alibi* is greatly increased, if it be set up at the moment when the accusation is first made, and consistently maintained throughout to the hour of trial. On the other hand, it is a material circumstance to lessen the weight of a defence of this kind, if it be not resorted to until some time after the charge is made, or if, having been once resorted to, a different and inconsistent defence is afterwards set up.

The following is one of the most satisfactory and instructive cases of this kind which have ever occurred in our courts of justice. The defence was set up at the instant of the prisoner's apprehension, which took place within a few hours of the occurrence which was the subject of accusation, and was uniformly maintained without variation before the committing magistrates, at the coroner's inquest, and upon the trial; and no inroad was made on the continuity or credibility of the evidence by which it was established. The various timepieces to which the witnesses referred, which differed much from each other, were carefully compared and reduced to a common standard, and the circumstances left no rational doubt of the accuracy of the time as spoken to by all the witnesses.

Abraham Thornton was tried at the Warwick

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autumn assizes, 1817, for the murder of Mary Ashford. The deceased was found dead in a pit of water, about seven o'clock in the morning, with marks of violence about her person and dress ; and it was supposed that she had been violated and afterwards drowned. On the bank of the pit were found the deceased's bonnet and shoes, and a bundle. At the distance of forty yards was found upon the grass the impression of an extended human figure, with blood on the grass near to the centre of the impression ; and a large quantity of blood upon the ground near to the lower extremity of the impression ; and spots of blood were found in a direction leading from the impression to the pit upon a footpath, and about a foot and a half from the path upon the grass on one side of it ; and it was insisted that the spots of blood upon the grass must have fallen from the body of the deceased carried in some person's arms. When the body was found there was no vestige of any footstep on the grass, which was covered with dew not otherwise disturbed than by the blood. The prisoner and the deceased had met at a dance on the preceding evening, at a house which they left together about twelve o'clock. About three in the morning they had been seen talking together at a stile

near to the spot. About four o'clock in the morning the deceased called at the house of Mrs. Butler at Erdington, where she had left a bundle of clothes on the preceding day ; she appeared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of an hour. About fifteen minutes afterwards the deceased was seen walking alone toward her own house. Her way lay across certain fields, one of which adjoined that in which the pit was, and had been newly harrowed. Soon after the discovery of the body, there were found in the harrowed ground the recent marks of the footsteps of the prisoner and the deceased, which, from the length and depth of the steps indicated that there had been running and pursuit, and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken, her footsteps and those of the prisoner proceeded in a direction towards the pit and the spot where the impression was found, until the footsteps came within the distance of forty yards from the pit, when, from the hardness of the ground, they could be no longer traced. The marks of a man's running footsteps, not proved however to have been

the prisoner's, were also discovered in a direction leading from the pit across the harrowed field ; from which it was contended that the accused had run alone in that direction after the commission of the supposed murder. The mark of a shoe (also not proved to have been the prisoner's) was discovered near the edge of the pit, but it was alleged to be that of a man's left shoe; and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had had sexual intercourse with the deceased, with her own consent. The defence (supposing the *corpus delicti* to be proved) was an *alibi*. The deceased, it was proved, was successively seen after leaving Mrs. Butler's house by several persons, proceeding in a direction towards her own home, the last of whom saw her within a quarter of an hour after leaving Mrs. Butler's house, that is to say before or about half past four. At about half past four, and not later than twenty-five minutes before five, the accused was seen by several persons, wholly unacquainted with him, walking slowly and leisurely along a lane leading in an opposite direction from the young woman's course toward his father's house, where he lived. From Butler's

house to the pit was a distance of upwards of a mile and a quarter ; and from the pit to the place where the prisoner was first seen afterwards was a distance of two miles and a half ; so that upon the hypothesis of his guilt, a distance of upwards of three miles and a quarter must have been traversed, partly by the deceased and partly by the accused, and the pursuit, the criminal intercourse, the drowning, and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty-five minutes.

It is not too much to assert that it was not within the bounds of possibility that the prisoner could have committed the crime imputed to him ; nevertheless public indignation was so strongly excited that his acquittal occasioned great dissatisfaction. There was a total absence of all evidence of the *corpus delicti*, which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself, in a moment of bitter remorse, after parting from her seducer, and excited to agonizing reflection by the sight of so many appalling marks of her ruin. It is possible that she might have sat down to change her shoes, and fallen into the water from exhaustion ; for she had walked to and from market on the preceding day, had ex-

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erted herself in dancing in the evening, and had been wandering in the fields without food all night. It was further alleged that the prisoner had violated the deceased, and therefore had a motive to destroy her. This again was mere conjecture ; and from the circumstance of the deceased having been out all night with the prisoner, with whom she was previously unacquainted, and from the state of the garments which she took off at Butler's, as compared with those for which she had exchanged them, it was pretty clear that the sexual intercourse had taken place before the deceased called at Mrs. Butler's, where she made no complaint, but appeared composed and cheerful. Again, it was contended from the state of the grass, with drops of blood upon it where the dew had not been disturbed, that the deceased must have been carried in the arms of some person ; but here again there was no proof that the dew had not been deposited after the drops of blood ; and it clearly appeared that the footsteps could not be traced on other parts of the grass where, beyond all doubt, the parties had been together in the course of the night. Now, suppose that the *alibi* had been incapable of proof, that the prisoner had not been seen after parting from the

deceased, and that the inconclusiveness of the inference drawn from the discovery of drops of blood on the grass, where there were no vestiges of footmarks, had not been manifested from the absence of those marks in other places where the deceased had unquestionably been,—the guilt of the prisoner would probably have been considered indubitable, and his execution been too certain ; and yet these exculpatory circumstances were entirely casual, collateral, and independent of the facts which were supposed to be clearly indicative of guilt*.

* See Observations upon the case of Abraham Thornton, &c., by Edward Holroyd, Esq., which contains the Judge's notes of the Trial ; and *Ashford v. Thornton*, Barnwell and Alderson's Reports, vol. i. p. 405.

CHAPTER VI.

RULES OF INDUCTION APPLICABLE TO CIRCUMSTANTIAL EVIDENCE.

By the process of induction is, in strictness, meant, the investigation and bringing in, one by one, of instances bearing upon the point in question, till a sufficient number has been collected ; but the word induction is also frequently, though inaccurately, employed to comprehend the deduction of some distinct inference from those premises, in which sense it is often called the interpretation of facts*.

It has been observed by a celebrated writer on the science of mind, that “ the knowledge of the philosopher differs from that information which is the fruit of common experience, not in kind, but in degree ;” and that “ the ultimate object which the philosopher aims at in his researches, is precisely the same with that which every man of plain understanding, however un-

* Whately's *Logic*, book iv. ch. 1. sect. 1 and 2 ; Whewell's *Mechanical Euclid*, p. 174 ; and Stewart's *Elements*, vol. ii. ch. 4. sect. i.

educated, has in view, when he remarks the events which fall under his observation, in order to obtain rules for the future regulation of his conduct*." Every branch of philosophical research involves essentially the same logical and inductive process.

Evidence is necessarily of various kinds, according to the nature of the subject ; but the precautionary maxims of judgement calculated to guard against the erroneous assumption of facts, and to aid in the formation of a correct estimate of the effect of relevant facts, must in all cases be substantially the same. It was beautifully observed by Lord Bacon, that " it is the office and excellence of all sciences to shorten the long windings and turnings of experience ;" and the emphatic language of a late distinguished philosopher, that " science is nothing more than the refinements of common sense making use of facts already known to acquire new facts," is peculiarly appropriate in relation to subjects of moral inquiry†.

There are scarcely any rules, perhaps none, which in strictness relate exclusively to judicial

* Stewart's Elements, vol. ii. ch. iv. sect. 1 ; and see Bentham's Rationale of Judicial Evidence, book i. ch. 1.

† Consolations in Travel, etc., by Sir Humphry Davy, p. 234.

inquiries founded upon circumstantial evidence ; the maxims which specially apply to cases of that kind being rather in the nature of corollaries from general propositions, applicable to moral evidence of every kind. But inasmuch as the maxims which philosophic wisdom and judicial experience have laid down, as safeguards of truth and justice with respect to evidence in general, apply with peculiar force and pertinency to cases of circumstantial evidence, it is necessary briefly to advert to them ; and the more especially so, as they facilitate the transition to considerations more peculiarly appropriate to the subject.

RULE 1.—*The facts alleged as the basis of the inference must be strictly connected with the factum probandum.* This is an indispensable rule of all sound induction. In moral investigations the facts are more obscurely developed than when physical phænomena are the subjects of inquiry ; and they are frequently blended with foreign and irrelevant circumstances, so that the verification of them, and the establishment of their connection with the *factum probandum*, is often matter of considerable difficulty. No weight must be attached to circumstances which, however they may excite conjecture or suspicion, do not warrant belief.

The line of demarcation between conjecture and reality is sometimes so indistinct as to be imperceptible. Occurrences may be mysterious, and justly excite suspicion; but inasmuch as the connection may be only apparent, every circumstance which is not *proved* to be actually connected with the fact in support of which it is alleged, must be rejected from the judicial scale.

Circumstances of apparent suspicion are sometimes cleared up, and shown to have been suspicious in appearance only. On the trial of Joseph Downing at Shrewsbury summer assizes, 1822, before Mr. Justice Bayley, for the murder of his brother-in-law Samuel Whitehouse, it was proved that the prisoner and the deceased had met in order to shoot, and to look at an estate which, in the event of the deceased's demise without children, would devolve upon the prisoner; and after drinking together during the day, they set out to return home. After proceeding a short distance, the prisoner returned for his gun-barrel, which he had left behind. The deceased went on in advance, and was shortly afterwards found lying on the road fatally wounded. The person who discovered him went for assistance, and after a short absence returned; in the mean time the deceased's pockets had been rifled

of his watch and money. Suspicion fell on the prisoner, who was supposed to have inflicted the wound with his gun-barrel ; but it was contended that the deceased must have fallen from his horse and been kicked. The case ended in acquittal* ; and not till about twelve months afterwards was the mystery of the robbery explained. A man was apprehended upon offering the deceased's watch for sale, and brought to trial for the theft, but acquitted ; the judge thinking that he ought not to be called upon at so distant a period to account for the possession of the deceased's property, which he might have purchased or otherwise fairly acquired, without being able to prove it by evidence. The accused, when out of peril, admitted that finding the deceased drunk and helpless he had robbed him, but, on learning that it was suspected that the deceased had been murdered, had concealed the watch to prevent suspicion of the supposed murder.

A farmer was tried, under the special commission for Wiltshire, on the 5th of January 1831, upon an indictment charging him with

* A Report of the Trial of Mr. Joseph Downing, on an indictment charging him with the wilful murder of Mr. Samuel Whitehouse, &c., taken in short-hand ; and see *Rex v. Thornton*, *infra*.

having feloniously sent a threatening letter, which was alleged to have been in the handwriting of the prisoner. That the letter was in the prisoner's handwriting was positively deposed by witnesses who had had ample means of becoming acquainted with it, while the contrary was as positively deposed on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the scale appears to have been turned by the fact that the letter in question, and two others of the same kind sent to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper; the ragged edges of the different portions exactly fitting each other, and the water-mark name of the maker, which was divided into three parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for fourteen years. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was brought to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. The son then wrote on a piece of paper from memory a copy of the contents of the anonymous letter, which on comparison left

no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little; and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so, he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and two days afterwards the son was convicted of the identical offence imputed to the father. It appeared that the son had had access to the bureau, which was commonly left open. The writing of the letter constituted in fact the *corpus delicti*; there having been no other evidence to inculcate the prisoner as the *sender* of the letter, which would however have been the natural and irresistible inference had he been the *writer*. The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, foreign, as it turned out, to the *factum* in question; and considering that other persons had access to the bureau, its weight even as a circumstance of suspicion seems to have been overrated*.

* *Rex v. Isaac Looker*, and *Rex v. Edward Looker*, Annual Register for 1831, p. 9.

RULE 2.—*The burthen of proof is always upon the party who asserts the existence of any fact which infers legal responsibility**. This is a universal rule of jurisprudence, founded upon evident principles of wisdom and justice ; and it is a necessary consequence, that the affirmant party is not absolved from its obligation because of the difficulties which may attend its verification. But the operation of this rule may, to a certain extent, be modified by circumstances which create a counter obligation, and shift the *onus probandi*†. It follows, from the very nature of circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction‡. It is therefore a qualification of the rule in question, that in every case the *onus probandi* lies on the person who is interested to support his case by a particular fact, which lies more particularly within his own knowledge, or of which he is supposed to be

* Starkie on the Law of Evidence, vol. i. p. 362.

† See *ante*, p. 86.

‡ Mr. Justice Abbott in *Rex v. Burdett*, Barnwall and Alderson's Reports, vol. iv. p. 161.

cognisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged ; but when such proof has been given, it is a consideration to be applied in considering the weight of the evidence against him, whether direct or presumptive, that it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true*. It has been well observed, that in such case we have something like an admission that the presumption is just†. No person, said Mr. Justice Abbott, is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof leads be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise, he asks, than adopt the conclusion to which the proof tends ‡ ?

* Mr. Justice Bayley in *Rex v. Burdett*, *ibid.* p. 140.

† Mr. Justice Best, *ibid.*

‡ *Ibid.*

It is a corollary, rather than a substantive and independent rule, that the *corpus delicti* must be clearly and distinctly proved before any effect is attached to circumstances supposed to be inculpatory of a particular individual; but this is a subject of such great importance, and of such comprehensive extent, as to require consideration in a separate chapter.

RULE 3.—*The best evidence shall be adduced which the nature of the case admits.* This is indeed the master rule that governs all the subordinate rules of evidence*, and it is more especially applicable to cases of circumstantial evidence. The suppression or non-production of evidence necessarily raises a strong presumption against the party who withholds such evidence, when he has it in his power to produce it. The just legal inference is, that where that is not proved or confuted which ought to have been verified or contradicted, it must have been for want of the means of probation or of confutation†. Some interesting exemplifications of this rule appear in other parts of this Essay‡.

* Burke's Works, vol. ii. p. 618.

† Starkie on the Law of Evidence, vol. i. p. 436. Scott's History of Scotland, vol. ii. p. 134.

‡ See *ante*, p. 102, and *infra*, ch. vii.

RULE 4.—*Evidence ought in all cases, and à fortiori in cases of circumstantial evidence, to be received with distrust, whenever any considerable time has elapsed since the commission of the alleged crime.* Considering the inherent infirmity of human memory, this is a most necessary caution. The wisdom and justice of punishment inflicted after any considerable interval, at least where the offender has been always amenable to justice, are at least questionable*. An unavoidable consequence of great delay is, that the party accused is deprived of the means of vindicating his innocence, or proving the attendant circumstances of extenuation; the crime itself becomes forgotten, or is remembered but as matter of tradition; the offender may have become a different moral being; and punishment can seldom, perhaps never, be efficacious for the purpose of example. On these accounts judges and juries are properly reluctant to convict parties charged with offences committed long previously†.

* See *Rex v. William Andrew Horne, Esq.*, executed at Nottingham in 1759, for the murder of his natural child forty years before, *Celebrated Trials*, vol. iv. p. 396. *Rex v. Joseph Wall, Esq.*, *State Trials*, vol. xxviii. p. 51.

† *Rex v. Thomas Clewes, supra*; and *Rex v. Henry Roper*, tried for a murder alleged to have been committed thirty-four years before, at Leicester Summer Assizes, 1836, *Annual Register* for 1836.

RULE 5. *The circumstances proved must lead to, and establish to a moral certainty, the particular hypothesis assigned to account for them; in other words, the facts must be of such a nature that their existence is absolutely inconsistent with the non-existence of their alleged moral cause, and that they cannot be explained upon any other reasonable supposition.* The most important part of the inductive process is, the correct exercise of the judgement in drawing the proper conclusion from the facts. "Every accusation," says an eminent divine, "should be deemed null, until, both as to matter of fact and in point of right, it be fairly proved true; it sufficeth not to presume it may be so; to say, it seemeth thus, doth not sound like the voice of a judge; otherwise, seeing there never is wanting some colour of accusation, every action being liable to some suspicion or sinister construction, no person could escape condemnation; the reputation and interest of all men living would continually stand exposed to inevitable danger*."

RULE 6.—*The conclusion drawn from the premises assigned as its basis, must satisfactorily explain and account for all the facts, to the exclu-*

* The Theological Works of Dr. Barrow, Oxford edit. 1818, vol. i. p. 429.

*sion of every other reasonable solution**. It is not enough, however, that a particular hypothesis will explain all the phænomena: nothing must be assumed because, if true, it would account for the facts†. If, as is sometimes the case, the circumstances are equally capable of solution upon the hypothesis of innocence as upon that of guilt, they ought to receive a favourable construction, and to be discarded as presumptions of guilt‡. But if, on the other hand, the hypothesis fulfils *all* the required conditions, the conclusion is no longer a gratuitous assumption, but becomes, as it were, incorporated with and part of the induction. In such circumstances an additional test is obtained, by which, as by the application of a theorem of verification, the conclusion may be tried, and, if true, corroborated and confirmed. Assuming the truth of the conclusion, the previous method of proceeding may be reversed, and we can reason synthetically from cause to effect§: the conclusion, if it be true, will of necessity not only harmonize with, but, like the key of a cipher, satisfactorily account for all the

* *Théorie Analytique des Probabilités*, par Laplace; Introduction, cxxxiii.

† Lord Brongham's *Discourse on Natural Theology*, p. 164.

‡ Mascardus *De Probationibus*, vol. ii. Conclusio dcccLv.

§ Stewart's *Elements*, vol. ii. p. 346.

facts, to the exclusion of every other reasonable hypothesis. If the facts can be rationally explained upon more hypotheses than one, it is manifest that the true cause is not exclusively ascertained, but remains in uncertainty*. In physical science, although the phænomena may be accounted for by several hypotheses, no unjust and injurious consequences result from the uncertainty. The constitution of light, for instance, may be explained equally well by the supposition that it is composed of three distinct principles, or that it consists of rays having different degrees of refrangibility. It is not essential, in investigations of physical facts, that any conclusion should be formed as to the cause of the phænomena; whereas in moral investigation it constitutes the substantive matter of inquiry, and erroneous conclusions may be not merely harmless but fatally dangerous†.

RULE 7.—*If there be any reasonable doubt as to the proof of the corpus delicti, or as to the reality of the connection of the circumstances of evidence with the factum probandum, or as to the proper con-*

* *Théorie Analytique des Probabilités*; Introduction, cxxxiii.

† See the valuable remarks of Lord Brougham on Induction in his *Discourse on Natural Theology*, part i. sect. 7; and *Stewart's Elements*, vol. ii. ch. 1, 2, and 4.

clusion to be drawn from those circumstances, it is safer and therefore better to err in acquitting than in convicting; or, as it is more popularly expressed, "that ten guilty persons escape, than one innocent man should suffer."* This caution follows irresistibly from the foregoing considerations. Paley controverts the maxim, and urges that "he who falls by a mistaken sentence may be considered as falling for his country; while he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld." But it can never be admitted to be a sufficient vindication of rules adopted in order to the discovery of truth, that such is only "their *general effect and tendency*." An erroneous sentence is calculated to create distrust of the judicial office, and to impair its dignity and efficacy; while to the sufferer and to his connections the mischief is incalculable and irremediable. "It is a rule of equity and humanity, built upon plain reason," says Dr. Barrow, "that rather a nocent person should be permitted to escape, than an innocent should be constrained to suffer; for the impunity of the one is but an inconvenience, the suffering of the other is a wrong: the punish-

* Moral and Political Philosophy, book vi. ch. 9.

ment of the guilty yieldeth only a remote probable benefit; the affliction of the blameless involveth a near certain mischief: wherefore it is more prudent and more righteous to absolve a man of whose guilt there are probable arguments, than to condemn any man upon bare suspicions*." The magistracy may order honourable interment, and posthumous testimonials of innocence, and acknowledgements of judicial error†; the survivors may be honoured with the special protection of the sovereign‡; but the husband, the father, the citizen cannot be restored to the widowed and orphan survivors or to his own social rights. The emphatic language of an enlightened statesman and profound moralist, in condemnation of political sacrifices, applies with especial and unanswerable force in reprobation of reasons of expediency in defence of judicial conviction: "The least reflection will enable a reader, even if he only glances over the surface of history, to perceive how surely such stretches of

* Barrow's Theological Works, *ut supra*, vol. i. p. 429.

† See the case of William Shaw, executed at Edinburgh, in 1701, for the alleged murder of his daughter; Appendix to Considerations on the Criminal Proceedings of this Country, etc., *ut supra*; and the Theory of Presumptive Proof, p. 93.

‡ See the case of the venerable Calas, who was unjustly executed in 1762 for the alleged murder of his son, *ibid*.

power render their authors for ever odious, and how seldom (if ever) they were necessary to the safety of communities*.”

RULE 8.—*Capital punishment ought never to be inflicted without allowing a sufficient interval for calm and dispassionate revisal of the proceedings.* It was a great reproach to our criminal jurisprudence, that in cases of murder before the statute 6 and 7 Will. IV. c. 30., the sentence was carried into effect within a few hours after conviction; a provision proved by experience to be alike needless, inefficacious and unjust. The hasty execution of capital punishment savours of the spirit of vengeance, rather than of that dignified deliberation which, even in cases of merited punishment and necessary example, is indispensable to secure the concurrence of the enlightened and judicious. It is now provided, “for the ends of justice, and especially more effectually to preserve from an irrevocable punishment any person who may hereafter be convicted upon erroneous or perjured evidence,” that sentence of death may be pronounced after convictions of murder in the same manner, and that the judge shall have the same power in all respects as after convictions for other capital offences.

* Mackintosh's History of England, vol. iii. p. 123.

It is impossible to acknowledge too strongly the anxious attention which the judges give to investigations of this nature ; and the readiness with which they, as well as the public functionaries whose duty it is to advise the Crown in matters of this kind in the last resort, are disposed to attend, even after verdict, to well-considered and credibly attested objections. But the concurrence of the judges in the previous proceedings, the mistaken application of a well-known text of the Jewish Scriptures*, the supposed claims of public security, the dangers of mistaken tenderness, and of giving countenance to distrust of the tribunals, the cruelty of exciting hopes which may be disappointed, these and other considerations concur to render the revision of the deliberate verdict of a jury a duty of the most delicate and perplexing nature ; the responsibility of which would be greatly lessened by giving, under due restrictions and safeguards, a right of appeal, or, if the present anomalous and ill-adapted course of proceeding must be retained, by giving time and appropriate facilities for resort to the fountain of justice.

RULE 9.—*Not only the verity of the facts, but their alleged mutual relations, should be submitted to*

* Whately on Secondary Punishments, p. 107.

the most rigorous scrutiny; and every possible objection to the correctness and relevancy of the alleged inferences from them should be boldly advanced and fearlessly discussed. This rule is essential to the elimination of truth: it was profoundly remarked by Milton, that a man may be a heretic in the truth. No one can witness the proceedings of our higher courts of criminal jurisdiction without being struck with the anxious desire to do justice which is conspicuous in all their proceedings, and with the almost invariable correctness of their determinations*. An Englishman may apply to them with becoming pride the eulogium pronounced by a distinguished foreign lawyer, who declares that our higher courts of *civil* judicature, "generally, and with rare exceptions, present the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees†." The

* Convictions are sometimes impugned without due reflection: see the case of Hannah Russell and Daniel Leany, convicted of murder at Lewes summer assizes 1826, *Annual Register* for 1826, p. 26; and Christison on Poisons, p. 284. It was stated in the public journals in 1835, that a man named Savage had been executed for the murder of his wife, upon mistaken evidence of his identity; but the statement was officially contradicted in the House of Lords. *Annual Register* for 1835, p. 45; and *Mirror of Parliament* for 1835, pp. 601, 629.

† Kent's *Commentaries on American Law*, vol. i. p. 497.

high character of the judges for probity and intelligence, the popular institution of Trial by Jury, and the publicity of judicial proceedings, are generally efficient guarantees of impartiality. But it was a great discredit to our national character, that, prior to the recent statute 6 and 7 Will. IV. c. 114, persons accused of offences of a higher degree than misdemeanours, with the exception of the particular crime of treason, were permitted only the partial assistance of counsel, who could not address the jury upon the facts and substantial merits of the case, however complicated in themselves or penal in their consequences. The prohibition was the more unjust because the counsel for the prosecution were under no such restraint ; and our reports present many instances of eloquent and powerful addresses by accusing counsel, highly calculated, from the skilful selection, arrangement and detail of minute circumstances and latent connections, and from their argumentative and conjectural deductions, to produce the most prejudicial impressions. The injustice of this mode of proceeding was especially apparent in cases of accusation supported by circumstantial evidence.

The institutions of society can justly supersede so much only of natural right as is inconsistent

with general security : it is their prime and inestimable recommendation that they substitute the dominion of reason for that of force. The existence of a distinct legal order is found to be necessary in every country where commerce and intelligence have introduced complicated laws, and the diversified and intricate relations consequent upon a highly civilized state of society.

It is related that when Lord Shaftesbury, the author of "The Characteristics," stood up to speak in the House of Commons on the bringing in of the bill for regulating trials in case of high treason, one part of which allows counsel to the prisoner, he was so intimidated by the greatness of the auditory, that he lost his memory and was totally unable to proceed. The House, after allowing him a little time for recollection, called loudly for him to go on, which he did in the following terms: " If I, Sir, (addressing himself to the Speaker,) who rise only to give my opinion on the bill now depending, am so confounded that I am unable to express the least of what I proposed to say, what must the condition of that man be, who without any assistance is pleading for his life, and under apprehension of being deprived of it* !"

* *Biographia Britannica* (COOPER, ANTHONY ASHLEY).

The object and the general effect of the institution of a separate professional order, is to place every member of the community, whatever his station or talents, upon a footing of equality in the assertion and defence of his civil rights. Every argument which proves the necessity and expediency, and therefore the right, of professional assistance in *other* cases, applies with incalculably greater weight to the case of criminal charges affecting the best interests of social man, especially where they are supported by a kind of evidence liable to so many fallacies as have been shown to apply to circumstantial evidence.

It was said in palliation of the practice, that the law considers the judge to be counsel for the prisoner*. In a case which occurred not long ago, a witness called to prove an *alibi* deposed that he knew the prisoner was in bed by his coughing; upon which the judge "charitably suggested," says the learned writer who relates the occurrence, "that this was so far from being proof of an *alibi*, that it raised the probability that the prisoner had been out of the house, and that the night air had made him cough†." Upon a trial for the murder of a *male* child, the counsel

* Blackstone's Commentaries, vol. iv. p. 356.

† London Medical and Surgical Gazette, vol. viii. p. 36.

for the prosecution concluded his case without asking the sex of the child, and the judge would not permit him afterwards to call a witness to prove it, and in consequence of the omission he directed the jury to acquit the prisoner*. Such are the inconsistencies and absurdities which result from attempting to defend a practice, radically unjust and indefensible, by the application of a mere legal fiction.

To discuss the objections which have been made to the full concession of the right to be defended by counsel in criminal cases, is neither necessary nor within the scope of this Essay; and to treat them as worthy of serious consideration, would be to pay to them a degree of respect of which they are entirely undeserving. To our national reproach, England is the only country where a similar denial of right prevailed; and the Anglo-Transatlantic States, who have adopted so many of our positive institutions and so much of our judicial practice, have repudiated it as incompatible with free institutions, and contrary to the sacred and inviolable principles of justice and humanity. Britain, foremost in so many social ameliorations, has been the last

* Christian's Notes to Blackstone's Commentaries, vol. iv. p. 356.

to abrogate this worse than Gothic injustice ; and it is only since the late statute 6 and 7 Will. IV. c. 114. that persons tried for felonies have become entitled, “ after the close of the case for the prosecution, to make full answer and defence thereto by counsel, or by attorney in courts where attorneys practise as counsel.” It may assuredly be predicted that public justice, as well as individual safety, will be greatly promoted by the change.

It would have been easy to extend this Essay by a multiplication of rules ; but it will be found that other rules are redundant, and substantially comprehended under those which have been given ; and there is little reason to doubt that, judiciously applied, they will lead to conclusions which will seldom be found erroneous.

CHAPTER VII.

PROOF OF THE CORPUS DELICTI.

EVERY allegation of legal crime involves the establishment of two separate propositions ; namely, that an act has been committed from which legal responsibility arises ; and that the legal guilt of such act attaches to a particular individual.

Such a complication of difficulties often attends the proof of crime, and so many cases have occurred of conviction of alleged offences which were never committed, that it is a sound rule of legal procedure, derived to us from the Romans, (those great lights in all that relates to jurisprudence,) to require satisfactory proof of the *corpus delicti*, either by direct evidence or cogent and irresistible grounds of presumption*, before it is permitted to adduce evidence tending to inculcate any particular person.

If it be objected that rigorous proof of the *cor-*

* *Rex v. Burdett*, *Barnwall and Alderson's Reports*, vol. iv. p. 123.

pus delicti is sometimes unattainable, and that the effect of exacting it must be that crimes will occasionally pass unpunished, it must be admitted that such may possibly be the result. But it is answered, that where there is no proof, or, which is the same thing, no sufficient proof of crime, there can be no legal guilt. Considerations of expediency can never supersede the immutable obligations of justice, and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent. Such considerations of mistaken policy led the civilians to adopt the execrable maxim, that the more atrocious was the offence, the slighter was the necessary proof; and when the plea of expediency is once permitted to influence judicial integrity, such is the logical and inevitable consequence.

The rule in question is so important in relation to cases of circumstantial evidence, that it will be expedient to illustrate its pertinency and propriety at some length; and, for the sake of brevity and simplicity, the exemplifications will be borrowed from cases of alleged murder.

In the application of this rule to cases of homicide it is essential that there be distinct proof, first of the fact of *death*, and secondly of the *specific cause* of death; without which proof no individual

can be implicated, or reasonably required to explain or account for facts of supposed suspicion.

I.—The inspection of the body necessarily affords the best evidence, as well of the identity of the deceased, as of the fact of death; and a conviction of murder is never allowed to take place, unless the body has been found, or there is equivalent proof of the fact of death*; and many cases have shown the peril of a contrary practice. Joan Perry and her two sons were executed in the year 1660 for the murder of William Harrison, who had suddenly disappeared, but in about two years afterwards re-appeared. The deceased had been out to collect his lady's rents, and had been robbed by highwaymen, who put him on board a ship, which was captured by Turkish pirates, by whom he was sold into slavery†. Sir Matthew Hale mentions a case where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed the body to ashes in an oven, whereupon B. was indicted of murder, and convicted and executed, and within one year afterwards A. returned, being indeed sent beyond sea by B. against his will; "and so," that learned

* *Rex v. Thurtell and others, infra.*

† *State Trials*, vol. xiv. p. 1312.

writer adds, " though B. justly deserved death, yet he was really not guilty of that offence for which he suffered*." Sir Edward Coke also gives the case of a man who was executed for the murder of his niece, who was afterwards found to be living, of which mention has been made in a former part of this Essay†.

But to require the production of the body in all cases would be unreasonable, and lead to absurdity and injustice ; since the murderer might secure impunity by effectually disposing of his victim, which has sometimes been attempted by burning, though generally without success, owing to the slow and imperfect combustibility of animal matter. The fact of death may therefore be inferred from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt. On the trial of a marine for the murder of his captain at sea, a witness stated that the prisoner had proposed to kill the captain, and that, being alarmed in the night by a violent noise, he went upon deck, and saw the prisoner throw the captain overboard ; that he was not seen or heard of after-

* Pleas of the Crown, vol. ii. c. 39.

† See *ante*, p. 113 ; and see Green's case, State Trials, vol. xiv. p. 1311 ; and Arnott's Collection of Criminal Trials, p. 248.

wards, and near the place on the deck where the captain was, a billet of wood was found, and the deck and part of the prisoner's dress were stained with blood. It was strenuously argued that, as there were many vessels near the place where the transaction was alleged to have taken place, the probability was, that he had been taken up by some of them and was then alive ; but the Court, though they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed*.

The changes consequent upon death sometimes render identification difficult, or even impracticable ; but it frequently happens that the difficulty is diminished by the existence of collateral facts, which establish that identity inferentially to a moral certainty.

A man named Maccowan was tried at Perth circuit court, in May 1750, for the murder and robbery of a woman and her child. The prisoner, who was the reputed father, had enticed the woman to accompany him on a journey, under pretence of marrying her ; and took that opportunity of robbing her, and murdering both her and her

* *Hindmarsh's Case*, *Leach's Cases in Crown Law*, vol. ii. p. 571.

infant. Two bodies which were found, and supposed to be those of the mother and child, were mangled in the most inhuman manner, with the head and legs of one of them severed from the body, and both so disfigured that they could not be known ; but near to the bodies were found clothes and some other articles, which were proved to have belonged to the deceased ; and in the prisoner's possession were also traced articles which were proved to have belonged to the woman. The prisoner gave false and contradictory accounts as to the place where he had been on the morning of the murder, and he was seen soon after it with a good deal of money in silver ; while it appeared that the deceased had collected as much as she could previously to her leaving home with her child. The jury unanimously found the prisoner guilty of the murder and robbery*.

M'Dougal was tried at Inverary, in autumn 1807, for the murder of his wife ; and it was alleged that he had forced her over a precipice into the sea. The prisoner and the deceased had gone out together after they had supped. Their house was near the sea ; and soon after they had gone out, the shrieks of a person in distress were heard. The prisoner not long afterwards re-

* Burnett on the Criminal Law of Scotland, p. 540.

turned, without his wife ; and, being asked what had become of her, said he did not know. The body of a woman was found about two months afterwards in the sea some miles off ; but so disfigured that it could not be known, though part of the dress resembled that which the prisoner wore : in the stomach was found, undigested, part of the same sort of victuals which it was proved that the deceased had supped on the evening she was missing. The prisoner was found guilty*.

In a case before Mr. Justice Park, in Sussex, on the trial of a woman for the murder of her illegitimate child, it appeared that the supposed body of the child, from having been undiscovered until two months after it was alleged to have been born, was nothing but a mass of corruption ; there were no lineaments of the human face, and it was impossible even to ascertain the sex of the child. Upon this evidence the learned judge stopped the prosecution†.

II.—After excluding all doubt as to the fact of death, the next step in the proof of the *corpus delicti* is to exclude the hypotheses of death

* Burnett on the Criminal Law of Scotland, p. 540.

† See Mr. Justice Park's charge in *Rex v. Thurtell* and others for the murder of William Weare, at Hertford assizes, 6th January, 1824.

from self-inflicted violence, accident, or natural cause; and only when it is clearly established that no other hypothesis will rationally account for the facts, can it be properly concluded that death has resulted from intentional violence. The discrimination of these several causes of death is often matter of great difficulty, involving the profoundest considerations of medical science; some of which exhibit at once the difficulties with which these cases are beset, and the danger of drawing conclusions without the greatest deliberation and care. All such cases however come within the sphere of general jurisprudence, to which medical as well as all other scientific evidence is only subsidiary; since it is the peculiar province of courts of law to judge of the relation and bearing of that evidence, and to determine the nature of the legal inference to which it leads.

The cases which present the greatest difficulty, in establishing the *corpus delicti*, are those of infanticide, poisoning, and suicide.

II. 1.—As a consequence of the rule which exacts express proof of the *corpus delicti*, it is now required that, in cases of alleged infanticide, it shall be clearly proved that the child had acquired an independent circulation and existence,

and it is not enough that it had breathed in the course of its birth*. This rule embraces in its operation a number of cases, in which according to former practice conviction would have taken place. If however a child has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth†.

Cases of this distressing class in general involve questions principally of medical jurisprudence, in which respect simply they do not fall within the province of this Essay‡. The moral circumstances generally adduced as indicative of this crime may commonly be accounted for by the agency of a less malignant motive, and can therefore seldom be unequivocally pronounced to afford a safe presumption of murder. Hard must be the struggle between the opposing motives of shame and affection, before a mother can contemplate, and still more so before she can form and execute, the dreadful resolve of taking away

* *Rex v. Poulton*; *Carrington and Paine*, vol. v. p. 399: and *Rex v. Enoch*, *ibid.* p. 539.

† *Rex v. Brain*; *Carrington and Paine*, vol. vi. p. 350.

‡ See 'The Proofs of Infanticide considered,' by Dr. Cummin, for a summary of the present state of medico-legal knowledge on that subject.

the life of her own offspring. The unhappy subject of these conflicting emotions is commonly the victim of brutality and treachery. Deserted by a heartless seducer and scorned by a merciless world, scarcely any condition of human weakness can be imagined more calculated to excite the compassion of the considerate and the humane*. The wisdom and humanity of the Legislature have, in accordance with the spirit of the times, repealed the cruel rule of presumption which had too long survived the barbarous age which created it†; and made the endeavouring to conceal the birth of a child by secret burying, or otherwise disposing of the body, a substantive misdemeanor, instead of treating it as a conclusive presumption of murder‡.

In charges of poisoning, the object is to determine whether poison has been administered, and whether it has been the cause of death; for it does not necessarily follow, even where poison has been administered, that death has resulted from other than natural causes§. The principal

* See Dr. William Hunter's Tract on Child-murder, *supra*.

† Statute 21 Jac. I. c. 27, *ante*, p. 31.

‡ Statute 9 Geo. IV. c. 31. s. 14.

§ Mary Ann Alcorn's case, Syme's Justiciary Reports, vol. i. p. 221; and Charles Munn's case, Inverness spring circuit, 1824; Christison on Poisons, pp. 50, 82.

grounds upon which the proof of poisoning generally rests, are the symptoms during life, the *post mortem* appearances, chemical tests, and moral circumstances.

II. 2, 3.—The first and second of these heads of evidence involve questions of a medical nature merely ; but the diversity of opinion which prevails amongst medical jurists respecting the sufficiency of such evidence alone, and the consideration that the facts must be submitted to a popular tribunal, acting upon the principles of common observation and experience, render it expedient to notice the general result of those opinions, as applicable to this numerous class of cases of circumstantial evidence.

Medical writers appear to be agreed in opinion, that the symptoms and *post mortem* appearances which are commonly incident to cases of poisoning, are such as may in general be produced by other causes. Dr. Christison, while he admits with every esteemed author on medical jurisprudence that the symptoms, however exquisitely developed, can never justify an opinion in favour of more than high probability*, maintains that the doctrine applies only to the *general* characteri-

* Christison on Poisons, p. 39, citing Orfila, Henke, Tortosa, and Beck.

stics of the symptoms, and that in some cases of *particular* poisons,—as for instance sulphuric, nitric and oxalic acids, arsenic, the compounds of mercury*, and some others,—the symptoms only may occasionally afford decisive evidence of poisoning†. Dr. Christison conceives that “in many instances, both of acute and of chronic poisoning with the strong acids, contrary to the general statements of most systematic writers on modern medical jurisprudence, distinct evidence may be procured from the morbid appearances only‡.”

The effect of these several heads of evidence was much discussed in the memorable case of Captain Donellan, who was convicted at Warwick spring assizes, 1781, of the murder of his brother-in-law Sir Theodosius Boughton. The material facts of this case were as follow.

Sir Theodosius Boughton was a young man of fortune, twenty years of age, and in good health and spirits, with the exception of a trifling ailment, for which he occasionally took a laxative draught. His mother, his brother-in-law Captain Donellan, and his sister Mrs. Donellan lived

* Christison on Poisons, pp. 165, 207, 308, and 402.

† See the case of Richard Overfield, Shrewsbury assizes, 19th March 1824, for poisoning his own child with sulphuric acid, Edinburgh Medical and Surgical Journal, vol. xxii.

‡ Christison on Poisons, p. 169.

with him. At the age of twenty-one years Sir Theodosius would have been entitled to a fortune of 2000*l.* a year, which, in the event of his dying under age, would have descended to his sister Mrs. Donellan. Lady Boughton went into her son's room one morning for the purpose of giving him his draught, and remarked that it smelt like bitter almonds. In about two minutes Sir Theodosius struggled very much, as if to keep the medicine down, and Lady Boughton observed a gurgling in his stomach: in ten minutes he seemed inclined to dose; but in five minutes afterwards she found him with his eyes fixed upwards, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the draught he died. Lady Boughton ran down stairs to give orders to a servant to go for the apothecary, who lived at Rugby, a distance of three miles; and in less than five minutes the prisoner came into the bed-room, and after she had given him an account of the manner in which Sir Theodosius had been taken, he asked where the physic bottle was, and she showed him the two draughts. Donellan then took up one of the bottles and said, "Is this it?" and being answered "Yes," he poured some water out of the water bottle, which was just by, into the vial,

shook it, and then emptied it out into some dirty water which was in a wash-hand basin. Lady Boughton said, "You should not meddle with the bottle;" upon which the prisoner snatched up the other bottle and poured water into it and shook it: he then put his finger to it and tasted it. Lady Boughton again asked him what he was about, and said he ought not to meddle with the bottles; on which he replied he did it to taste it, though he had not tasted the first bottle. The prisoner ordered a servant to take away the basin, the dirty things and the bottles, and put the bottles into her hands for that purpose; but she put them down again, on being directed by Lady Boughton to do so. The body was examined ten days after death; but putrefaction was far advanced, and the head was not opened, nor were the bowels examined, and in other respects the examination was incomplete and unskilfully performed; so that very "little reliance," says Dr. Christison, "can be placed on the evidence from the inspection of the body*."

Captain Donellan had a still in his own room, which he had used for distilling roses; and a few days after Sir Theodosius's death he brought it full of wet lime to one of the servants to be cleaned. It also appeared that Sir Theodosius

* Christison on Poisons, p. 725.

shortly before his death had bought arsenic to poison fish, and some of it was afterwards found locked up in his closet. Captain Donellan resorted to several disingenuous devices to prevent the *post mortem* examination of the body, and to induce Sir William Wheeler, the young man's guardian, to believe that an examination had taken place; whereas the professional men, having been led by the prisoner to suppose it a case of ordinary sudden death, had declined the examination on account of the advanced state of putrefaction in which they found the corpse; and there were several other circumstances of suspicion in the prisoner's conduct. Four medical men*, of whom three were physicians, were examined on the part of the prosecution, and expressed a very decided opinion,—mainly grounded upon the symptoms, the smell of the draught as observed by Lady Boughton, and the similar effects produced by experiments on animals with laurel water to the symptoms in the case of Sir Theodosius,—that the deceased died from poison, and that the particular poison was laurel water. The weight of Dr. Rattray's opinion was greatly diminished by the fact, that after he had known all the symptoms, and seen the body opened, he had been as positive that Sir Theodosius died

* Drs. Rattray, Ashe, and Parsons, and Mr. Wilmer.

from arsenic, as he was at the time of the trial that he had died from laurel water. When asked, "Why may you not be mistaken now?" he answered, "I cannot conceive that in these circumstances any one can be mistaken as to the medicine: from the sensible qualities described by Lady Boughton, I believe it to be of that nature;"—the sensible qualities referred to being the resemblance of the smell to that of bitter almonds. Mr. John Hunter was examined on the part of the prisoner, and stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had taken poison, and that the appearances upon dissection explained nothing but putrefaction*.

This trial has given rise to great diversity of opinion amongst legal and medical men; and the evidence of Mr. Hunter subjected him to severe animadversion by some of his professional brethren†; other able writers however think that censure undeserved‡. Dr. Christison thus ex-

* Gurney's Report of the Trial, *ut supra*.

† Beck's Elements of Medical Jurisprudence, p. 901; Christison on Poisons, p. 725.

‡ Life of John Hunter, by James F. Palmer, prefixed to his Surgical Works, vol. i. p. 82; The Theory of Presumptive Proof, *ut supra*, p. 31; Elements of Juridical or Forensic Medicine, by George Edward Male, M.D., p. 65.

presses his opinion upon this memorable case :
“ The conclusion at which, in my opinion, every sound medical jurist must arrive is, that poisoning in the way supposed was very probable : but I cannot go along with those who think that it was certain ; nor is it possible to see on what grounds such an opinion can be founded, when the general or moral circumstances are excluded*.” This opinion seems to be sound and discriminating. It is clear that the opinions of the professional witnesses as to the nature of the draught were not formed upon symptoms and appearances only, but upon those symptoms and appearances joined with other facts and circumstances. Mr. Hunter was unsuccessfully pressed, by the counsel for the prosecution and by the learned judge, to give an opinion grounded upon those mixed elements, about which he justly and properly answered, that “ every man was as good a judge as he was.”

II. 4.—The most decisive and satisfactory evidence of poisoning is the discovery by chemical means of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken. Dr. Christison dissents from the opinion expressed by

* Christison on Poisons, p. 725.

all German and most French authors in medical jurisprudence, that "poisoning can never be completely substantiated unless the particular poison be found out*."

That broad doctrine has certainly never been adopted in English jurisprudence†; and its recognition would be fraught with danger. Some of the vegetable poisons, at least in the present state of chemical science, scarcely admit of that kind of proof‡; and to require it in all cases would be to proclaim impunity to offenders skilled in medical chemistry.

A case of conviction occurred in Scotland, where a servant-girl had mixed some poisonous matter with gravy. Dr. Christison was of opinion that all the symptoms might have been produced by natural means; and he was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce. In answer to questions by the Court, he said the probability was greatly strengthened by the fact, that the

* Christison on Poisons, preface, p. 14.

† *Rex v. Donellan*, *ut supra*; and *Rex v. Angus*, *infra*.

‡ Christison on Poisons, pp. 59, 630, 642.

violence of the symptoms was in proportion to the quantities of the suspected food taken *. The prisoner admitted that she had introduced a little powder, but declared that "it was only for a bit of fun," and not to do harm, but merely to sicken the parties†.

The following singular case of this kind occurred not long ago in Germany. A man of doubtful character and morals, well acquainted with chemistry and medical jurisprudence, and of disordered finances, was known to harbour a design on a friend's wife, who possessed a considerable fortune. At last he one morning invited the husband to breakfast with him at a tavern; and they breakfasted in a private apartment on beefsteaks, fried potatoes, eels, claret and rum. They had scarcely commenced the meal when his guest complained of feeling unwell, and soon afterwards he vomited violently. This symptom continued, along with excruciating pain in the belly, for a long time before the prisoner sent for medical aid; indeed he did not procure a physician till the sufferer had been

* *Rex v. Mary Ann Alcorn*, Syme's *Justiciary Reports*, vol. i. p. 221.

† This question was the subject of much discussion in the celebrated case of *Castaing*, *Causes Criminelles célèbres du Dix-neuvième Siècle*, p. 1.

also attacked with very frequent and involuntary purging. The physician, who before seeing his patient had received the prisoner's explanation of the apparent cause of the illness, was led at first to impute the whole to cholera, caught by exposure to cold ; but on returning at seven in the evening, and finding the gentleman had been dead for an hour, he at once explained that he had been poisoned. On the body being inspected much external lividity was found, contraction of the fingers, and great inflammation of the stomach and intestines, presenting an appearance like that of gangrene. Upon analysing some fluid left in the stomach no arsenic or other poison could be detected. The attention of the inspectors was turned specially to arsenic, because the prisoner was proved to have bought some of that poison, and to have made a solution of some white powder in his kitchen not long before the deceased died. The prisoner in his defence stated, that the deceased had been for some time much debilitated by the use of mercury, and while in this state was seized with cholera ; and he likewise attempted to make it probable that the man, in despair at his not recovering from a venereal disease, might have committed suicide. The council of physicians who were required to give their opinion

on the case stated, on the contrary, that the deceased was a healthy man, without any apparent disposition to disease ; that there was no pretext whatever for supposing suicide ; that the inflammatory state of the stomach and bowels supplied strong probability of poisoning with arsenic, but not certain evidence ; that acute gastritis from natural causes is always attended with constipation ; that the deceased presented symptoms of stupor, and other signs of derangement of the nervous system remarked in rapid cases of poisoning with arsenic ; that cholera is very rare at the end of November, the season when this incident occurred ; and that the poison might very well be discharged by vomiting. Although all the prisoner's statements in defence were contradicted by satisfactory proof, and the medical evidence of poisoning was supported by a chain of the strongest general circumstances, the crime was considered by the Court as not fully proved, because the prisoner could not be induced to confess, and because poison was not actually detected in the body. But, on account of the very strong probability of his guilt, he was, in conformity with the strange practice of the German courts in like cases, condemned to fifteen years' imprisonment. Considering the kind of symptoms, their

commencement during the meal, the rapidity of death, the signs of violent inflammation in the stomach after so short an illness, and the facility with which the absence of poison in the contents of the stomach may be accounted for, more especially if it be supposed that the poison was administered in solution, Dr. Christison considers the medical evidence of death by poisoning so very strong, that, the general evidence being also extremely strong, the prisoner's guilt was fully demonstrated*.

Upon general principles, it cannot be doubted that courts of law would require chemical evidence of the poisoning wherever it were obtainable; and it is believed that *no* modern case of satisfactory conviction can be adduced where there has not been such evidence, or, in its absence, the equivalent evidence of confession. The following remarkable case is highly instructive in relation to this important question.

Robert Sawle Donnall, a surgeon and apothecary of Falmouth, was tried at the spring assizes 1817 at Launceston, before Mr. Justice Abbott, for the murder of Mrs. Elizabeth Downing, his mother-in-law. The prisoner and the deceased were next-door neighbours, and lived upon friendly

* Christison on Poisons, p. 62.

terms ; and there was no suggestion of malice, nor could any motive be assigned which could have induced the prisoner to commit such an act, except that he was in somewhat straitened circumstances, and in the event of his mother-in-law's death would have become entitled to a share of her property. On the 19th of October the deceased drank tea at the prisoner's house, and returned home much indisposed, retching and vomiting, with a violent cramp in her legs, from which she did not recover for several days. On Sunday the 3rd of November, after returning from church, she dined at home on boiled rabbits smothered with onions, and, upon the invitation of her daughter, drank tea in the evening at the prisoner's house with a family party. The prisoner handed to the deceased cocoa and bread and butter ; and while she was drinking the second cup she complained of sickness, and went home, where she was seized with retching and vomiting, attended with frequent cramps ; and then a violent purging took place, and at eight o'clock the next morning she died. The nervous coat of the stomach was found to be partially inflamed or stellated in several places, and the villous coat was softened by the action of some corrosive substance ; the blood-vessels of the sto-

mach were turgid, and the intestines, particularly near the stomach, inflamed. The contents of the stomach were placed in a jug, in a room to which the prisoner (to whom at that time no suspicion attached,) had access; and it appeared that he had clandestinely tampered with those contents, by throwing them into another vessel containing a quantity of water. There were other suspicious moral circumstances in the prisoner's conduct, which are omitted in this analysis, as the case turned entirely upon the question of the sufficiency of the proof of the *corpus delicti*. Dr. Edwards concluded from the symptoms, the shortness of the illness, and the morbid appearances, that the deceased had died from some active poison; and in order to discover the particular poison supposed to have been used, he applied to the contents of the stomach the chemical tests of the sulphate of copper in solution and the ammoniacal nitrate of silver, which severally yielded the characteristic appearance of arsenic; the sulphate of copper producing a green precipitate, (whereas a blue precipitate is formed if no arsenic be present,) and the nitrate of silver producing a yellow precipitate, instead of a white precipitate, resulting if arsenic be not present. Dr. Edwards considered these tests infallible,

and used them, as he stated, because they would detect a minuter portion of arsenic ; on which account he considered it to be more proper for the occasion, as from the appearance of the tests he found there could not be much. Dr. Edwards also tried experiments upon the bile, mixed with water and with a decoction of onions, to ascertain whether any substances taken into the stomach would alter the appearances produced by those tests ; but they produced no appearance of arsenic. The great object of the prisoner's counsel was to extract from Dr. Edwards, upon his cross-examination, admissions, firstly, that the symptoms and appearances were such as might have been occasioned by some other cause than poisoning ; secondly, that the reduction test would have been infallible ; and thirdly, that it might have been adopted in the first instance, and might also have been tried upon the matter which had been used for the other experiments. Upon his re-examination, Dr. Edwards accounted for his omission of the reduction test, by stating, that the quantity of matter left after the other experiments would have been too small, and that it would not have been so correct to use the matter which had been previously subjected to the preceding

experiments. The prisoner's counsel, having obtained this admission, proceeded to neutralize and explain away the circumstances of presumption against the prisoner, by showing, first, that the symptoms and morbid appearances, though they were such as might and did commonly denote poisoning, did not exclude the possibility that it might also have been occasioned by cholera morbus or some other disease; secondly, that no valid reason existed why, if arsenic had been contained in the contents of the stomach, it had not been reproduced, either by an original experiment or by experiments on the matter to which the other tests had been applied; thirdly, that the dilution of the contents of the stomach had not rendered the experiment of reduction impracticable, but only made it more dilatory and troublesome; and fourthly, that the tests actually resorted to were fallacious, and produced the same appearances upon application to innocent matter, namely, the sulphate of copper producing the green, and the nitrate of silver producing the yellow precipitate on being applied to an infusion of onions. It was to no purpose to urge that a decoction of onions was not the same thing as that particular preparation of onions of which the deceased had partaken, and that in

the hands of the witness for the prosecution this experiment had been attended with a different result ; the facts adduced by the prisoner's witnesses conclusively proved that the appearances produced by the tests employed might be produced by some other cause than the presence of arsenic, and therefore that the tests were fallacious, while an infallible test might have been resorted to. Thus every one of the grounds of presumption against the prisoner was successively destroyed, and the case was consequently left without any substantial foundation ; though his conduct had naturally created impressions unfavourable to the belief of his innocence.

The chemical evidence brought forward in the case of Mary Ann Burdock, who was convicted at the Bristol spring assizes 1835, for the murder of Mrs. Clara Ann Smith by poison, presents an instructive contrast with that adduced in the last-mentioned case. The moral evidence was also strong. The deceased, a widow about sixty years of age, was possessed of considerable property in money, and had for several years lived in lodgings at various places, and ultimately went to live with the prisoner, who kept a lodging-house at Bristol. In October 1833 the deceased became indisposed from a cold, and in the even-

ing of the 26th of that month the prisoner gave her some gruel, into which she had been observed by a young woman, hired to wait on the deceased, to put some pinches of yellow powder, which she stated to be to relieve her from pain ; after which she twice washed her hands. The servant remarked to the prisoner upon this as an unusual mode of administering a powder. The prisoner told the servant not to take anything out of vessels used by the deceased, falsely represented her to be dirty in her habits, and cautioned her not to tell the deceased that she had put anything into the gruel, representing that if she knew there was anything in it she would not take it. The prisoner carried away what was left of the gruel ; and in a few minutes after the deceased had partaken of it, she complained of being poorly, and in half an hour became ill ; vomiting, purging and violent pain ensued, and in about two hours she expired. The prisoner had employed a man about six days before this event to purchase arsenic in order to poison rats, a pretext which was proved to be groundless. The deceased was buried on the 28th of October ; but her friends did not hear of her death until many months afterwards.

From the change which took place in the prisoner's habits and mode of living immediately after Mrs. Smith's decease, from her denial that she had left any property and from some other circumstances, suspicion was excited, and the corpse was disinterred and examined on the 24th of December, 1834, and found to be in a remarkable state of preservation. Without detailing all the appearances, it is sufficient to observe, that the mucous membrane of the stomach and duodenum was smeared very thickly with a large quantity of a yellow substance, which penetrated in patches the coats of the stomach and intestines; and where the spots had penetrated, the inside of the intestinal canal was stained to a much greater extent than the outside, so that it must have penetrated from the interior to the exterior, as would be the effect of the matter having been taken into the stomach. The yellow powder found in the stomach was submitted to various experiments. Having been dried, some of it was ground up with carbonate of soda and charcoal, and introduced into a reducing tube, and immediately a volatile metallic body was formed, which was metallic arsenic; the metallic arsenic was then oxidized, and it

sublimed into a white volatile oxide, which was characteristic of arsenious acid ; a solution was then made of the oxide, by infusing two drops of water and adding a small portion of ammoniacal nitrate of silver, when there was formed the characteristic yellow precipitate. Into another portion a minute quantity of ammoniacal sulphate of copper was put, which immediately produced the green precipitate of Scheele ; afterwards, a larger quantity was reduced, and a stream of sulphuretted hydrogen gas passed through it, and the original orpiment, or sulphuret of arsenic, reproduced. These various experiments were repeated five or six times, and uniformly with the same results. The stomach was then washed in water, and the substance, allowed to precipitate, and dried up, was weighed and found to contain seventeen grains. Lastly, the animal matter was destroyed and the arsenic dissolved, and the sulphur turned into sulphuric acid and precipitated by sulphuretted hydrogen gas, which reproduced sulphuret of arsenic. From thirteen grains of the mixed matter were obtained four grains of sulphuret of arsenic ; and there were still some portions adhering to the stomach which could not be washed off ; and it must be remembered too that some had been

evacuated by vomiting. This case is one of the most satisfactory on record*.

Sometimes the circumstances attendant upon death from poison are so obscure, that it is impossible with certainty or safety to conclude that it was not taken voluntarily by the deceased for the purpose of self-destruction, or even to ascertain with certainty that poison has been administered or taken at all.

A young man named Freeman, a druggist's apprentice, was tried at the Leicester spring assizes 1829, before Lord Chief Justice Best, for the murder of Judith Boswell, his master's female servant, by prussic acid. The deceased was pregnant by the prisoner, and was found one morning dead in bed. A number of circumstances led to the suspicion that the apprentice had been instrumental in the administration of the poison: but it was proved that the deceased had made arrangements for a miscarriage by artificial means on the very night in question; and it was therefore represented, on the

* Printed Report of the Trial, Transactions of the Provincial Medical and Surgical Association, vol. iii. p. 465; London Medical Quarterly Review, vol. iv. p. 390; London Medical and Surgical Journal, vol. vi. 760; Beck's Medical Jurisprudence, p. 762; and Report of the Sixth Meeting of the British Association for the Advancement of Science, App., p. 67.

part of the prisoner, that she had taken the poison of her own accord. It appeared that she had taken prussic acid from a partially emptied phial, which lay corked and wrapped in paper beside her bed, where she was found lying with the bed-clothes drawn up to her chin, and her arms folded across the body. A piece of leather and string, which appeared to have been taken from a bottle, were found in the room. It was considered in the highest degree improbable, but was generally admitted by the medical witnesses to have been *possible*, that the deceased might have corked the bottle after taking the dose from which she died ; and the prisoner, though his conduct had very deservedly drawn suspicion upon him, was therefore acquitted. The fact is instructive and admonitory, that Professor Christison, (in the subsequent editions of his book on poisons,) with the candour which ever marks the scientific mind, acknowledges that the concurrence which in the first edition of that work he had expressed in the opinion of the majority of the witnesses, that there could not have been time after swallowing the poison for performing the acts of volition implied in the supposition of suicide, was given rather too unreservedly ; and he mentions a lately published

case of suicide, in which an apothecary's assistant was found dead in bed, with an empty two-ounce phial on each side of the bed ; the mattress, which is used in Germany instead of blankets, pulled up as high as the breast, the right arm extended straight down beneath the mattress, and the left arm bent at the elbow*.

On the trial of Charles Angus at Lancaster, in 1808, for the murder of Miss Burns by poison, there was abundant evidence of suspicious conduct to fix the prisoner as the criminal, had there been clear proof of the *corpus delicti*. The immediate cause of death was an aperture in the stomach, alleged to have been caused by the action of poison, and the particular poison suspected to have been used was sublimate of mercury ; but it was considered possible that it might have been a case of spontaneous perforation after death from natural causes, and there was no evidence that poison had been administered. One of the medical witnesses gave great offence by his testimony in favour of the accused, and it occasioned much angry controversy ; but the appearances have since been declared by Pro-

* *Rex v. Freeman*, Christison on Poisons, p. 705 ; London Medical and Surgical Journal, vol. viii. pp. 527, 750 ; and Beck's Medical Jurisprudence, p. 887.

fessor Christison to be incompatible with the effects of a strong corrosive poison unless death had occurred very soon after it was swallowed, which was out of the question*.

The reports of the Scotch tribunals contain some remarkable examples of the successful application of toxicological science to criminal jurisprudence†; and cases of poisoning are treated to great advantage in that country. Medical reports of the results of the investigation are made by the professional attendants at or near the time of the occurrence, which are read in evidence, and afterwards the witnesses are subjected to examination and cross-examination in relation to the matter of their reports‡; and such reports, and all articles intended to be offered in evidence, are deposited with the proper officer for production at the time of trial§.

II. 5.—It of necessity happens that circumstances of suspicion in the conduct of the accused are frequently blended with the scientific testi-

* Christison on Poisons, p. 133, and the printed report of the trial.

† See the cases of Mary Elder or Smith, Margaret Wishart, and John Lovie, all cases of poisoning by arsenic, Syme's Justiciary Reports, vol. i. p. 101, and Appendix, pp. 1, 24.

‡ Allison's Practice of the Criminal Law of Scotland, p. 601.

§ Ibid., p. 593.

mony; but it is apprehended that conviction cannot be considered satisfactory unless the crime be established by adequate evidence independently of the moral circumstances. It is the peculiar office of evidence of moral circumstances to discriminate the guilty individual, rather than to supply deficiency of substantive and independent evidence as to the existence of the *corpus delicti*. Dr. Christison urges that "there may be sufficient evidence in the symptoms and morbid appearances, without any chemical facts, to render poisoning so highly probable, that, in conjunction with strong moral circumstances, no sensible man can entertain any doubt on the subject*." Mr. Justice Abbott, in his charge to the jury upon Donnall's case, in reference to this question, said, "If the evidence as to the opinions of these learned persons who have been examined on both sides, should lead you *to doubt* whether you should attribute the death of the deceased to arsenic having been administered to her, or to the disease called cholera morbus,—then, as to this question as well as to the other question, the conduct of the prisoner is most material to be taken into consideration; for he being a medical man could not be ignorant of

* Christison on Poisons, p. 62.

many things as to which ignorance might be shown in other persons : he could hardly be ignorant of the proper mode of treating cholera morbus ; he could not be ignorant that an early burial was not necessary ; and when an operation was to be performed, in order to discover the cause of the death, he should not have shown a backwardness to acquiesce in it ; and when it was performing, and he attending, he could not surely be ignorant that it was most material for the purposes of the investigation that the contents of the stomach should be preserved for minute examination*." It is manifest that the learned judge intended these remarks to apply only to cases circumstanced as the one before him was ; for thus to conjoin the moral circumstances with the medical facts, as an element of proof of the poisoning in cases not so circumstanced, appears to be open to objection ; since the hypothesis of poisoning is resorted to in order to account for the moral circumstances as well as for the morbid appearances, while the moral circumstances are appealed to as corroborative of the evidence of poisoning.

The following case affords an example of the complication of minute circumstances which

* Report of the trial, *ut supra*.

sometimes present the only grounds for presuming that the crime of murder has been committed. Archibald Maclellan was tried at Inverness, September 1830, for the murder of his wife by strangling her on the sea-shore and throwing her over a rock into the ocean. The body of the deceased, who was a maniac, and for some years had wandered through the country apart from her husband, was found on the sea-shore on a Friday night, with evident marks of compression and violence on the throat, and contusions and wounds on the head. The prisoner had frequently been heard to express ill-will toward her, and used her in a violent and cruel manner; having on one occasion pitched her on her head among some stones, and on another, only two days before the death, forced her head under water in a brook near his house after sunset, till the eyes almost started out of their sockets. On the morning of the day on which the body was found, the deceased left the house of a neighbour where she had passed the night, and which was situated at a short distance from the sea-shore; and shortly after she set out the prisoner called, inquiring for her, and being told which way she had gone, proceeded in the same direction. He was seen by two witnesses

following her toward the sea-shore, where they were both lost sight of. She was at the distance of about twenty yards from the place where her body was afterwards discovered, and he was cutting across by a shorter path through some potatoes in the same direction. At the top of a rock, at a short distance from the place where the body was found, were discovered the marks of a desperate struggle ; the track of something heavy having been drawn for some yards over the grass to the very edge of the rock was quite evident, and the tufts of bent and projecting eminences on this line were torn up, as if caught hold of by some creature while endeavouring to resist violence and save itself from being pushed over. Human excrement was found on this spot, which bore the appearance of having been voided when the person was in the act of being dragged ; and fragments of the bed-gown and handkerchief which the deceased wore that morning were found lying on the spot close to the marks. A sharp stone of three pounds weight was found there also, which had been newly taken out of its bed, the appearance of which was quite fresh ; and the footmarks were those of two persons, one with and the other without shoes. The prisoner on the morning in

question had on shoes, his wife none. Two hours after they had been seen going toward and so near this fatal spot the prisoner returned home, and was seen with his shoes wet, though there was no dew on the grass and the weather was fine. It was nearly full tide at this time, and the person who pushed the body into the water would probably in such a state of the tide have wetted his shoes. The jury found the libel not proven; "a result," says the reporter, "not at all surprising, considering the class from whom the persons intrusted with that important duty are drawn in that remote and uncivilized district; but Lords Meadowbank and Mackenzie thought the case proved, and the verdict," he adds, "would probably have been different in any other city of the kingdom." The rule of proof which prevails in England is far less strictly applied in Scotland*.

III.—Suicide and accident are sometimes artfully suggested and plausibly urged as the causes of death, where the allegation cannot receive direct contradiction; and in such cases the truth can be ascertained only by a comparison of all the attendant circumstances, some of which,

* See Allison's Principles of the Criminal Law of Scotland, p. 82.

if the defence be false, are commonly found to be irreconcilable with the cause assigned. Although these cases are generally connected with questions of medical science, yet, as the facts must be submitted to the test of experience and common observation, as applied by the mass of mankind in many other cases not less difficult of determination, such cases in their more general aspects and bearings belong to general jurisprudence, and supply important illustrations of general legal doctrines; and they moreover show the manner in which such defences are frequently repelled by their manifest incompatibility with the attendant circumstances.

William Corder was tried at the Bury St. Edmund's summer assizes, 1828, for the murder of Maria Marten. The deceased had borne a child to the prisoner, and was taken by him from her father's house under the pretence of his taking her to Ipswich to be married. The prisoner having represented that the parish officers meant to apprehend the deceased, she left her house on the 18th of May in disguise, a bag containing her own clothes having been taken by the prisoner to a barn belonging to his mother, where it was agreed that she should change her dress. The deceased was never heard of afterwards;

and the various and contradictory accounts given of her by the prisoner having excited suspicions, which were confirmed by other circumstances, it was ultimately determined to search the barn ; where, on the 19th of April, a distance of nearly twelve months, the body of a female was found, which was clearly identified as that of the deceased. A handkerchief was drawn tight round the neck, and a wound from a pistol-ball was traced through the left cheek, passing out at the right orbit ; and three other wounds were found, one of which had entered the heart, and all of which had been made by a sharp instrument. The prisoner, who in the interval had removed from the neighbourhood, upon his apprehension denied all knowledge of the deceased ; but in his defence he admitted the identity of the remains, and alleged that an altercation took place between them at the barn, in consequence of which, and of the violence of temper exhibited by the deceased, he expressed to her his determination not to marry her, and left the barn ; but that immediately afterwards he heard the report of a pistol, and going back found the deceased on the ground apparently dead ; and that, alarmed by the situation in which he found himself, he formed the determination

of burying the corpse and accounting for her absence as well as he could. But the variety of the means and instruments employed to produce death, some of them unusual with females, was considered so important, in connection with the contradictory statements made by the prisoner to account for the absence of the deceased, and the general moral circumstances, as entirely to discredit the account ultimately set up by him. He afterwards made a full confession, and was executed pursuant to his sentence*.

At the Durham autumn assizes, for 1824, Mr. Hodgson, a surgeon, was tried for attempting to poison his wife. It was proved that pills containing corrosive sublimate, and compounded by the prisoner, were given by him to her in place of pills of calomel and opium, which had been ordered by her physicians. But it was alleged by him that, being at the time intoxicated, he had mistaken for the shop-bottle containing opium the corrosive sublimate bottle, which stood next it. This was certainly an improbable error, considering that the opium was in powder and the sublimate in crystals. But it was not the only one which he alleged that he had committed. Not long after his wife was taken

* Printed Report of the Trial.

ill, the physician sent the prisoner to the shop to prepare for her a laudanum draught, with water for the menstruum. When the prisoner returned with it, the physician, in consequence of observing it to be muddy, was led to taste it before he gave it to the sick lady; and finding it had the taste of corrosive sublimate, he preserved it, analysed it, and discovered that it did contain that poison. The prisoner stated in his defence that he had a second time committed a mistake, and instead of water had accidentally used for the menstruum a corrosive sublimate injection, which he had previously prepared for another patient; but this was proved to have been impossible, since the injection contained only five grains to the ounce, while the draught, which did not exceed one ounce, contained fourteen grains*.

James Greenacre was tried before the Central Criminal Court, on the 10th of April 1837, for the murder of Hannah Brown. The prisoner and the deceased were to have been married, in the prospect of which event the deceased had converted nearly all her goods into money. On the morning of the 24th of December the de-

* Edin. Med. and Surg. Journ., vol. xxii. p. 438; and Christison on Poisons, p. 82.

ceased left her home, stating to a neighbour that she was going to the house of her intended husband at Camberwell, but should return in the evening. On the 28th of December the trunk of a female was found in the Edgware Road, without its head or legs ; on the 6th of January a female head was found in the Regent's Canal, and on the 2nd of February the legs of a female were found in an osier-bed at Camberwell : these several parts were clearly ascertained to be parts of the same body, and were identified as the remains of the deceased. Upon his apprehension the prisoner at first denied all knowledge of the deceased ; but he subsequently admitted that on the evening of the day on which she left her home she came to his house, and he alleged that they had had an altercation in consequence of her duplicity in the statement of her property ; that during this conversation the deceased was moving backwards and forwards in her chair, which was on the balance ; that he put his foot to the chair, when she fell back with great violence against a block of wood ; and that finding life extinct, he made up his mind in the alarm of the moment to conceal her death, and get rid of her remains, to effect which he had divided them in the manner stated. This ingenious fa-

brication was clearly refuted by the professional witnesses, who proved that a wound in the eye, which had occasioned the escape of the humours and around which there was an ecchymosis, must have been inflicted during life, and deprived the deceased of sense for a time; that clearly it could not have been occasioned by a blow at the back of the head; and that from the retracted state of the muscles of the neck and the emptied condition of the blood-vessels, her throat must have been cut either before or immediately after death.

A remarkable case of this kind occurred lately in France. "About five in the morning the head of a man was found under the second arch of the Pont de la Tournelle, in Paris; the trunk of the body was afterwards discovered in a sink in the Rue de la Houchette, and the two lower extremities near the Pont Neuf. Subsequent inquiries led to the knowledge that the deceased was a man of the name of Ramus, and that he had been a soldier, lately employed as a messenger for the bureau of a receiver of taxes. The head and body being deposited at the Morgue, the medical examination commenced, which, from the very great length at which it was reported, renders it exceedingly difficult to enter

much into it, though, from the careful and judicious mode of procedure, the medical men in this country would derive great advantage from its perusal. The exterior appearance showed the deceased to be about thirty ; the countenance exhibited not the slightest mark of suffering or of anxiety ; the features were calm, the eyes half open, the mouth wide open, the skin pale and livid ; there was a slight wound upon the forehead, and there were two or three slight bruises upon the face, but no other indication whatever of violence upon any part of the body. The medical men, from all the circumstances which presented themselves, on examining the manner in which decapitation and amputation had been performed, came to the conclusion that Ramus was killed during sleep, and that sleep must have been produced by artificial means ; that it was either the result of drunkenness, or the effect of some narcotic ; that the throat must have been cut, and an immense quantity of blood lost ; that the decapitation and the cutting off of the limbs must have been immediately performed by a person accustomed to such operations either on man or on animals ; that the instrument must have been sharply edged and long, either such as is used for amputation or for the kitchen,

that he must have been a vigorous person, that all the incisions were made by the same hand, and that the murderer became nervous as he concluded his horrid act. They then proceeded to the examination of the internal parts of the body, which led them to pronounce that the unfortunate man had laboured under no disease which had a tendency to terminate life suddenly ; that death was solely produced by the cutting of the throat ; that the contusions on the face were the result of the endeavours made, during the amputation, to perform it quickly ; and that death must have taken place about three hours after he had had a meal. The contents of the stomach were submitted to analysis, and were pronounced to contain a small quantity of alcohol and of hydrocyanic or prussic acid, but its quantity could not be determined. About three weeks afterwards the murderer was arrested, or rather delivered himself into the hands of justice ; for, learning that his son, who had been just apprenticed to an apothecary at Paris, had been taken up on suspicion, he returned to Paris, having previously left it for Arc. He confessed to the Prefecture of Police, after some hesitation, his crime ; and it was most satisfactory to all those who were interested in the sub-

ject to find how completely the opinions given by the medical men were borne out by the narrative of the person who committed the deed. Just previous to the death of Ramus he had given him a mixture of brandy and prussic acid, and had murdered his victim exactly in the manner in which the documents delivered in by the examiners of the body had led the public to expect. In the examination of the contents of the stomach there were proved to be present traces of other matters which had been taken. The rooms in which the murderer lived were next the subject of examination, and all the bottles, the utensils, and the different stains and marks which were visible became the subject of chemical investigation; each particular of every substance that had been taken was completely analysed, and everything entirely elucidated; and so thoroughly satisfactory a chain of evidence was submitted to the jury, that, even without the necessity of receiving the confession, the man was found guilty of poisoning, murder, and theft*."

The discussion and illustration of the rule in

* *Annales d'Hygiène Publique et de Médecine Légale*, par MM. Chevalier et Boys, quoted in the *Lancet*, vol. ii. p. 796, in a Lecture by Dr. Sigmund.

question might be greatly extended, by an examination of its application to other offences beside that of murder. But the subject has been sufficiently exemplified for the purposes of this Essay; and such an extended examination would therefore be superfluous, and transgress its legitimate limits. The cases which have been cited strikingly exhibit the exact accordance between judicial practice and the dictates of the most enlightened reason.

CHAPTER VIII.

OF THE FORCE AND EFFECT OF CIRCUMSTANTIAL EVIDENCE.—CONCLUSION.

SECTION 1.

GENERAL GROUNDS OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

IN considering the force and effect of circumstantial evidence, the credibility of the *testimony*, as distinguished from the credibility of the *fact*, is assumed, since it is a quality essential to the value of circumstantial in common with all moral evidence*.

The proving power of circumstantial evidence, as incidentally stated in a former part of this Essay, depends upon its incompatibility with, and incapability of explanation upon, any other supposition than that of the truth of the principal fact in proof of which it is adduced†. The fearful explosions of human passion which bring to light

* See some valuable observations on the credibility of testimony in Kirwan's Logic, vol. i. ch. vi. sect. 2, and ch. vii. sect. 6.

† *Supra*, p. 26.

the darker elements of man's moral nature, must ever present to the philosophic observer considerations of deep intrinsic interest ; but to the jurist, the moral and mechanical coincidences which connect different facts with each other are relevant and important, principally as they are the intermediate connecting links between criminal actions and the malignant feelings and dispositions in which they originate.

If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in question ; that he has so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime ; that he has possessed the requisite means and opportunities of effecting the object of his wishes ; that recently, after the commission of the act in question, he has become possessed of the fruits or other consequential advantages of the crime ;—if he be identified with the *corpus delicti* by any conclusive mechanical circumstances, as by the impressions of his footsteps or the discovery of any article of his apparel or property at or near the scene of the crime ; if there be relevant appearances of suspicion, connected with his conduct, person, or dress, and

such as he might reasonably be presumed to be able to account for, but which nevertheless he cannot or will not explain ; if he be put upon his defence *recently* after the crime, under strong circumstances of adverse presumption, and cannot show where he was at the time of its commission ; if he attempt to evade the force of those circumstances of presumption by false and incredible pretences, or by endeavours to evade or pervert the course of justice by conduct inconsistent with the supposition of his innocence, —the concurrence of all or of many of these cogent circumstances naturally, reasonably, and satisfactorily establishes the moral certainty of his personal guilt, if not with the same degree of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case and the vast majority of human actions admit. The following cases present striking illustrations of the application and bearing of extrinsic and mechanical as well as of moral circumstances, and are among the most curious and instructive cases of circumstantial evidence on record.

In the autumn of 1786 a young woman, who lived with her parents in a remote district in the stewartry of Kirkcudbright, was one day left

alone in the cottage, her parents having gone out to the harvest-field. On their return home a little after mid-day they found their daughter murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. Upon opening the body the deceased appeared to have been some months gone with child, and on examining the ground about the cottage there were discovered the footsteps of a person who had seemingly been running hastily from the cottage, by an indirect road through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes the *soles* of which had been

newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also along the track of the footsteps, and at certain intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral a number of persons of both sexes attended, and the steward-depute thought it the fittest opportunity of endeavouring if possible to discover the murderer; conceiving rightly that to avoid suspicion, whoever he was, he would not on that occasion be absent. With this view he called together after the interment the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off and measured; and one of the shoes was found to resemble, pretty nearly, the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish; which led to a suspicion that he must have been the father of the child, and had been

guilty of the murder to save his character. On a closer examination however of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at that place. The measurement of the rest went on, and after going through nearly the whole number, one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails. William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work, a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted; but some circumstances occurring a few days afterwards, having a tendency to excite it anew, the young man was apprehended and lodged in jail. Upon his examination he acknowledged that he was *left-handed*, and some scratches being observed on his cheek he said he had got them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been on

the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided ; but in the course of the inquiry it turned out that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day ; that he called at a smith's shop under pretence of wanting something, which it did not appear he had any occasion for ; and that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-servants) she saw a person exactly with Richardson's dress and appearance running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's carts ; and that when passing by a wood which they named, Richardson said that he must run to the smith's shop and would be

back in a short time. He then left his cart under their charge, and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been longer absent than he said he would be, to which he replied that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle ; on which they asked where he had been. He said he had stepped into a marsh, the name of which he mentioned ; on which his fellow-servants remarked, "that he must have been either mad or drunk if he had stepped into that marsh, as there was a footpath which went along the side of it." It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day. They were found concealed in the thatch of the apartment where he slept, appeared to be much soiled, and to have some drops of blood on them. The last he accounted for by saying, first, that his nose had been bleed-

ing some days before ; but it being observed that he had worn other stockings on that day, he said he had assisted in bleeding a horse ; but it was proved that he had not assisted, and had stood at such a distance that the blood could not have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood. The shoemaker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellects, and had on one occasion been seen with her in a wood, in circumstances that led to a suspicion that he had had criminal intercourse with her ; and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved further, by the person who sat next to him when his shoes were measuring, that he trembled much, and seemed a good deal

agitated ; and that in the interval between that time and his being apprehended he had been advised to fly, but his answer was, “ Where can I fly to ? ” On the other hand, evidence was brought to show that, about the time of the murder, a boat’s crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased ; and it was said that some of the crew might have committed the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighbourhood. The prisoner was tried at Dumfries, in the spring of 1787, and the jury by a great plurality of voices found him guilty. Before his execution he confessed that he was the murderer ; and said it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him, where the knife would be found with which he had perpetrated the murder : and it was found accordingly in the place he described, under a stone in a wall, with marks of blood upon it*.

* Burnett’s Criminal Law of Scotland, p. 524. This case is also concisely stated in the *Memoirs of the Life of Sir Walter Scott*, vol. iii. p. 39 ; and it supplied one of the most striking incidents in *Guy Mannering*.

The casual discovery of circumstances which indicated the existence of a powerful *motive* to commit the deed,—the facts, that it was committed by a *left-handed* man, as the prisoner was, thus narrowing the range of inquiry,—and that there was an interval of absence which afforded the prisoner the necessary *opportunity* of committing the crime,—the prisoner's false assertion that he had not been absent from his work on that day, contradicted as it was by witnesses who saw him on the way to and in the vicinity of the scene of the murder, amounting to an admission of the relevancy and weight of that circumstance if uncontradicted,—the discovery near the spot of footsteps, clearly and infallibly identified to be his,—his agitation at the time of the admeasurement and comparison of his shoe with the impressions,—the discovery of his secreted stockings, spotted with blood, and distinctly soiled with mire peculiar to the vicinity of the cottage,—the scratches on his face,—his various contradicted statements,—all these particulars combine to render this a most satisfactory case of conviction, and to exemplify the high degree of assurance which circumstantial evidence is capable of producing.

William Howe, alias John Wood, was tried at the Stafford Lent assizes, 1813, for the murder

of Benjamin Robins. The deceased, a respectable farmer, had been at Stourbridge market on the 18th of December ; which place he left on foot a little after four in the afternoon, to return home, a distance of between two and three miles. About half a mile from his own house the deceased was overtaken by a man, who inquired the road for Kidderminster ; and they walked together for two or three hundred yards, when the stranger drew behind and shot the deceased in the back, and then robbed him of about eleven pounds in money and a silver watch. The deceased noticed that the pistol was long and very bright, and that the robber had on a dark-coloured great-coat, which reached down to the calves of his legs. Several circumstances, of correspondence with the description given by the deceased, conspired to fix suspicion upon the prisoner, who for about fourteen months had worked as a carpenter at Ombersley, seventeen miles from Stourbridge. It was discovered that he had been absent from that place from the 17th to the 22nd of December ; that on the 23rd of that month he had taken two boxes, one containing his working-tools and the other his clothes, to Worcester, and there delivered them to a carrier, addressed to John Wood at an inn

in London, to be left till called for, the name by which he was known being William Howe ; and that on the 25th he finally left Ombersley, and went to London. Upon inquiry at the inn to which the boxes were directed, it was found, that a person answering the description of the prisoner had removed them in a mealman's cart to the Bull in Bishopgate Street, and that on the 5th of January they had been removed from thence in a cooper's cart. Here all trace of the boxes seemed cut off ; but on the 12th of January the police officers succeeded in tracing them to a widow woman's house, in a court in the same street ; when, upon examining the box which contained the prisoner's clothes, they found a screw-barrel pistol, a pistol key, a bullet mould, a single bullet, a small quantity of gunpowder in a cartridge, and a fawn-skin waistcoat ; which latter circumstance was important, as a man supposed to be the prisoner was seen in Stourbridge on the day of the murder, dressed in a waistcoat of that kind. By remaining concealed in the woman's house the police were enabled to apprehend the prisoner, who called there on the following evening. Upon his apprehension, he denied that he had ever been at Stourbridge, or heard of the deceased being shot ;

and he accounted for changing his name at Worcester, by stating that he had had a difference with his fellow work-people, and afterwards that he did it to prevent his wife, whom he had determined to leave, from being able to follow him. On being asked where he was on the 18th of December, he said he believed at Kidderminster, a town about six miles from Stourbridge. Upon the prisoner's subsequent examination before the magistrates, he stated that he was at Kidderminster on the 17th of December, and at Stourbridge on the 18th, (the day of the murder,) but that he was not out of the latter town from the time of his arrival there, at one o'clock in the afternoon, until half-past seven o'clock on the following morning; that in the afternoon of that day he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. The account which the prisoner thus gave of himself was proved to be a tissue of falsehoods. He had been seen by several witnesses between four and five o'clock in the afternoon of the day in question, on the road from Stourbridge, toward, and not far from, the spot where the murder was committed; one of the witnesses saw him ramming something down, as if charging a gun, and an-

other saw him get a thorn from the hedge ; it was also proved that he afterwards called at a house on the road, and asked a woman for a pin, probably to prick the touch-hole ; and he was afterwards seen to put something into his left-hand great-coat pocket. About half-past five, a man, resembling the prisoner, was seen going in great haste in the direction from the spot where the deceased had been shot, toward Stourbridge. The prisoner called at two public-houses at Stourbridge,—at the first of them about six o'clock, and at the other about nine o'clock the same evening ; at both of which places the robbery and attack had been the subject of conversation, in which the prisoner joined ; and he was distinctly spoken to as wearing a fawn-skin waistcoat. It was also proved that the prisoner on the 21st of December had sold the deceased's watch at Warwick, stating it to be a family watch. But the most conclusive circumstance was, that a letter was written and sent by the prisoner while in gaol to his wife, who, being herself unable to read, had got a person to read it to her ; and it was found to contain a direction to remove some things concealed in a rick near Stourbridge ; where, upon search being made, were found a glove, containing three bullets, and a

screw-barrel pistol, the fellow to that found in the prisoner's box ; and a gun-maker gave it as his opinion that the bullet extracted from the wound had been discharged from a screw-barrel pistol, such as that produced, and that that bullet and the bullet found in the prisoner's box were cast in the same mould*.

The physical possibility of the prisoner's guilt was unquestionable, inasmuch as he was near the spot at or about the moment when the murder was committed ; his denial, contrary to the truth, that he had ever been at Stourbridge, or heard of the act, denoted a consciousness of the fatal effect of any evidence tending to establish the fact of his presence there. The discovery of a fawn-skin waistcoat in the prisoner's possession, corresponding with that worn by the stranger seen at Stourbridge in the evening of the murder, and stated to be the prisoner,—his disposal of the deceased's watch within three days after he had delivered it to his murderer,—his false statement that it was a family watch,—the discovery of the articles found in the rick, in consequence of the prisoner's own act,—the correspondence between the weapon found in the rick and that found in the prisoner's box, and between

* Compiled from the Brief, and a contemporary Report.

the bullet extracted from the wound and that found in the same box, and the peculiarity that the deceased had been killed by a wound from a screw-barreled pistol,—all these circumstances placed the guilt of the prisoner beyond any reasonable doubt, and there was no possibility of referring them to casual and accidental coincidence, or of explaining them upon any hypothesis compatible with his innocence. The prisoner was convicted, and before his execution fully confessed his guilt.

John Smith, John Varnham, and George Timms were tried before Mr. Justice Coltman, at the Norfolk spring assizes 1837, for the murder of Hannah Mansfield, on Tuesday the 3rd of January preceding. The deceased, who was about forty years of age, lived alone in a cottage at Denver, on the border of a common, at a distance from the turnpike road leading from Hilgay through Denver to Downham, and remote from any other house, except an adjoining cottage under the same roof, occupied by a labourer and his family. The deceased had acquired some repute as a fortune-teller, for which purpose she kept by her some money, which she called her bright money; and she possessed a quantity of plate, consisting of cream-jugs, table-

and tea-spoons, sugar-tongs, salt-cellars, and a silver tankard, which she kept in a corner cupboard and had frequently boastfully displayed. The deceased spent the evening preceding the murder at her neighbour's house, which she left about half-past eleven ; her neighbour's wife, being engaged in washing, did not go to bed till one o'clock ; when she disturbed her husband, who as he lay awake about two o'clock heard a noise in the deceased's cottage, but hearing nothing further he went to sleep again. About ten o'clock on the following morning the poor woman was found dead in her cottage, with her throat cut from ear to ear ; the cottage door had been split open by some violent effort, and the cottage had been robbed of the deceased's money and treasure. The footsteps of two men were traced from the turnpike-road toward the deceased's house, and from the house into the stack-yard, and back again to the footpath, and across the common to a run of water, and thence to the turnpike-road : one of the footsteps was very large, and peculiarly shaped and nailed, there being four nails in the centre of the heel, in a line from back to front, and two on each side ; and there were nails also in the waist of the heel, between the sole and the heel, and the

sole was very full of nails. The prisoner Timms's shoes exactly corresponded with these marks ; the other footstep was a smaller one, and full of nails. The large footmark proceeding from the house had marks of blood, and the smaller footstep was on the other side of the path, and the centre of the path was so hard and beaten that a third person might have walked on it without leaving any impression. Only the larger footstep was traced to the stack-yard, but both footsteps were traced in a direction toward and from the house. There was also the footstep of a third person, who appeared to have been stationed for the purpose of watching the back door of the adjoining cottage. The three prisoners had worked in the neighbourhood as excavators, a few months before the murder ; and about twelve months previously, the prisoner Smith, in company with two other men, had called at the adjoining cottage, and asked if Hannah Mansfield was at home, supposing that to be her cottage, stating that he had lost some tools, about which he wished to consult her. The prisoners had been loitering in the neighbourhood of the deceased's cottage, at various low public-houses, for several days preceding the murder, and they left one of those public-houses about two miles from her

residence, where they had spent the evening, about eleven o'clock on the night of the murder.

Three men, corresponding in appearance with the prisoners, one of whom was identified as the prisoner Timms, were met on the following morning about three o'clock, a mile from the deceased's house, walking very fast along the road from Denver to Downham; and about half-past eight o'clock the same morning the same three men were seen at Leverington, fourteen miles from Denver, apparently fatigued, and the pocket of one of them stuffed with something bulky. At Sutton St. Edmund's, about twenty miles from Denver, the prisoners stopped at a public-house to refresh themselves, and one of them paid away a very bright and unworn sixpence and shilling, of the year 1817. After having staid several hours the prisoners proceeded to Whaplode Drove, where they remained at a public-house for several days, and fell into company with a shoemaker, who made two pairs of boots for Varnham and Smith, for which Timms paid in a half-sovereign, a half-guinea and a sixpence. Varnham cut the tops from his old boots, and the landlord's wife burned the soles, and threw the clates upon an ash-heap, where they were afterwards found by

a police-officer, and they exactly fitted one of the impressions made in the snow near the cottage. While sitting by the fireside one evening at this public-house, the prisoner Smith laid hold of the bottom of his pocket, which seemed heavy, and a bundle contained in a silk handkerchief dropped out, from which some tea-spoons, a pair of sugar-tongs and some glass fell on the floor; the glass was broken, the other things he hastily collected and replaced. On the following day the prisoner Timms called upon the shoemaker, and, pretending to talk about the shoes, told him that "he need not say anything about what he had seen, as it might get the landlord into a scrape, though for themselves they did not care about it, as they had got the things from Lisbon." On Saturday the 7th of January the prisoners were traced to Wittlesea, where they offered for sale to a gunmaker a mass of molten silver, upwards of two pounds weight, which the prisoner Timms said had consisted of spoons, salt-cellars, and elegant things fit for any table,—a description corresponding with the deceased's plate; and they offered to purchase a pair of pistols. The silver was cut by the person to whom it was offered into six or seven pieces, and offered by him for sale to another person;

but not having succeeded in disposing of it, they gave his wife in return for his trouble a small strip of it, weighing about an ounce, and three keys, which were afterwards identified as having belonged to the deceased. The prisoners were then traced to and apprehended at Doncaster. To the officers they gave false accounts of themselves. Stains of blood were found upon some parts of the clothes of all the prisoners, and the clothes of two of them appeared to have been washed in order to remove stains. The prisoners had all new clothes, and on the person of Smith were found several pounds in money, a picklock key, lucifer matches, and a knife on which was some coagulated blood ; and on the person of Timms was found, wrapped up in a piece of linen, a piece or wedge of molten silver. With several of their fellow-prisoners Smith and Varnham conversed upon the subject of this cruel action in language of disgusting coarseness and brutality ; and their language implied guilty knowledge and participation in the crime, as they expressed confidence of security if their companions remained silent, as nobody saw them go to the house*.

The knowledge which the prisoners possessed

* Compiled from the Brief, and a contemporary Report.

of the locality of the deceased's cottage, and of her character and circumstances,—their presence in the vicinity at so unseasonable and suspicious an hour, in the inclement season of mid-winter, and so close upon the time when the deceased was murdered,—their subsequent wanderings, apparently without an object,—their profuse expenditure of money, and apparently wanton destruction of valuable articles of apparel,—their possession of so much money and molten silver when apprehended,—the correspondence of the shoe-marks about the cottage with the shoes of two of the prisoners,—and, above all, the possession of the deceased's keys,—the concurrence of these strong and otherwise inexplicable facts could not be rationally accounted for except by the conclusion of the guilt of the prisoners, who made a full confession. Smith and Timms were executed; but the sentence as to Varnham was mitigated.

It is scarcely possible, in the absence of unimpeachable direct evidence, to conceive of any general grounds of moral judgement more satisfactory and conclusive than those afforded by such combinations of facts as were presented in the several foregoing cases.

SECTION 2.

CONSIDERATIONS WHICH AFFECT THE FORCE OF
CIRCUMSTANTIAL EVIDENCE IN PARTICULAR
CASES.

The preceding considerations relate to the force and effect of circumstantial evidence in *general*; but there are some collateral considerations which affect the force of circumstantial evidence in *particular* cases; and greatly augment the strength and security of our convictions.

I. The principal of these auxiliary considerations arises from the concurrence of separate and independent circumstances pointing to the same conclusion, especially if they be deposed to by unconnected witnesses. In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes, and the more secure becomes our conviction of the moral certainty of the fact they are alleged to prove; as the intensity of light is increased by the concentration of a number of rays to a common focus. It is forcibly remarked by a learned writer, that "the more numerous are the particular analogies, the greater is the force of the general ana-

logy resulting from the fuller induction of facts, not only from the mere accession of particulars, but from the additional strength which each particular derives by being surveyed jointly with other particulars, as one among the correlative parts of a system*." Although neither the combined effect of the evidence, nor any of its constituent elements, admits of numerical computation, it is indubitable, that the proving power increases with the number of the independent circumstances and witnesses, according to a geometrical progression. "Such evidence," in the words of Dr. Reid, "may be compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose†."

The increase of force produced by the concurrence of independent *circumstances*, is analogous to that which is the result of the concurrence of several independent *witnesses* in relating the same fact. The combined effect in such cases is represented by a fraction, which has for its nume-

* Hampden's *Essay on the Philosophical Argument for Christianity*, p. 63.

† *Essay on the Intellectual Powers*, chap. iii.

rator the product of the chances favourable to the testimony of each witness, and for its denominator the sum of all the chances, favourable and unfavourable, the unfavourable chances being the product of the several deficiencies of the witnesses. If the case be taken of three witnesses whose several credibilities are $\frac{3}{4}$, $\frac{4}{5}$, $\frac{5}{6}$, the sum of the favourable chances is 60, being the product of $3 \times 4 \times 5$ the several numerators ; and the sum of the deficiencies is the product of the several denominators $1 \times 1 \times 1 = 1$, and the fraction expressive of the combined credibility is therefore $\frac{60}{60 + 1} = \frac{60}{61}$ *.

It is manifest that in both cases the effect of concurrent witnesses, and of separate circumstances, is to add immensely to the separate effect of each, and unless the deficiency in their several probabilities be considerable, the effect will be little inferior to certainty. This proposition may be thus represented more generally. Let it be supposed that the witnesses are all equal in proving force, and that the common deficiency is $\frac{1}{a}$, unity representing certainty, and a being always greater than unity, and the number of witnesses being

* Kirwan's Logic, vol. ii. chap. vii. sect. 14. *Traité Élémentaire des Probabilités*, par S. F. Lacroix, p. 219, etc.

n , the deficiency will then be represented by $\frac{1}{an}$, which of course is small in proportion as a and n are considerable ; and if each of them be taken as equal to 10, the resulting deficiency will in that case be only $\frac{1}{10,000,000,000}$, a quantity scarcely perceptible, and which for practical purposes may be totally disregarded*.

From the difficulty of forming an exact estimate of the veracity of the witnesses, and from the number of qualifying considerations connected with facts which are the subjects of testimonial evidence, the cases to which this kind of reasoning can be safely applied are comparatively few, and even in those cases, the conclusions can in general be regarded only as approximately true ; nevertheless an approximation of this kind, says Laplace, when well conducted, is preferable to the most specious reasonings†.

If the witnesses or the facts be *dependent* on each other, so that the second depends for its truth upon the first, the third upon the second, and so on, then the effect of the evidence diminishes with every increase in the number of the

* Hartley's Observations on Man, ch. iii. sect. ii. Proposition LXXX.

† Théorie analytique des Probabilités ; Introduction, p. LXXXII.

witnesses or of the facts, just as an increase in the denominator of a fraction reduces it to one of inferior value. The credibility of a fact thus attested, is found by multiplying the fractions expressive of the separate credibilities of the witnesses unto each other. If, as before, the effect of the testimony of each of the witnesses be $\frac{1}{a}$, and the number of witnesses n , the resulting probability of $\frac{1}{a^n}$ decreases rapidly with every increase of a and n^* . Laplace illustrates the subject by supposing a fact to be transmitted through twenty persons, the first communicating it to the second, the second to the third, and so on ; and by supposing the credibility of each witness to be equal to $\frac{9}{10}$, so that at every time the account is delivered from one person to another, the evidence is only $\frac{9}{10}$ of what it was before ; and the credibility of the fact, as resulting from the combined testimony of all the witnesses, would then be less than an eighth : and even in passing through only five witnesses its credibility would be reduced down to $\frac{59049}{100,000}$, or less than six-tenths of unity, scarcely more than doubtful. The same distinguished writer com-

* Kirwan's *Logic*, vol. ii. chap. vii. sect. xix. ; and Hartley's *Observations on Man*, *ut supra*.

pare the diminution of probability in such cases to the gradual obscuration of an object by means of the interposition of successive pieces of glass, of which a small number is sufficient totally to conceal an object which is distinctly seen through a single piece*.

In all judgements founded upon circumstantial evidence the essential difference between moral and mathematical certainty must be carefully borne in mind. Mathematical principles are seldom capable of being applied in the estimate or illustration of moral evidence except in a very general way ; though it cannot be denied, as is forcibly observed by Hartley, that the mathematical mode of considering the subject, wherever the nature of the case admits of it, is much more precise and satisfactory, and differs from the common one, just as the judgement made of the degree of heat by the thermometer does from that made by the hand†.

A learned writer has illustrated the subject by a case which at first sight seems a strong, if not an extreme case, and it has occasionally been

* *Théorie analytique des Probabilités, ut supra* ; Introduction, p. viii.

† Hartley's *Observations on Man*, cū. ii. sect. ii. Proposition LXXXVII.

pressed in argument with much force*. “Let it be supposed,” says he, “that A. is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns, and that a person apprehended in the same fair or market where the robbery takes place is found in possession of the same remarkable combination of coin and of no other, but that no part of the coin can be identified; and that no circumstances operate against the prisoner except his possession of the same combination of coin: here, notwithstanding the very extraordinary coincidence as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature†.” The probability that the coins lost and those discovered are the same is so great, that perhaps the first impulse of every person unaccustomed to this kind of reasoning is unhesitatingly to conclude that they certainly are so; yet, nevertheless, the case is one of probabi-

* Trial of the Rev. Ephraim Avery, charged with the murder of Sarah Maria Cornell, before the Supreme Court of Rhode Island, May, 1833. (Boston.)

† Starkie's Law of Evidence, vol. i. p. 506.

lity only, the degree of which is capable of exact calculation*: but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would and that which would not justify the infliction of penal retribution in other cases of inferior probability. In the case of a small number of coins, two or three for instance, the probability of their identity would be very weak; and yet the two cases, though different in degree, are in principle the same; and the chance of identity is in both cases equally capable of precise determination. The learned writer adds, that "although the fact taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury." In like manner it would be difficult to resist the infer-

* According to the formula

$$\frac{n(n-1) \dots 2.1}{1.2 \dots a_1 \times 1.2 \dots a_2 \times 1.2 \dots a_3 \times 1.2 \dots a_m.}$$

(Peacock's Algebra, p. 206.)

ence of the identity of the coins had they been scarce or foreign ones. A circumstance of this kind occurred in the case of William Holden and three other men, who were convicted at Lancaster autumn assizes, 1817, before Chief Baron Richards, of the murder of Margaret Marsden and Hannah Partington, the two female servants of Mr. Littlewood, who had gone from home, leaving them alone in the house. The perpetrators of this cruel murder had stolen from the premises a quantity of plate and clothes, 140*l.* in Bank-of-England notes, and nineteen guineas, one half-guinea, and a seven-shilling piece. Upon the persons of the prisoners were found upon their apprehension several bank notes, and amongst other coin one half-guinea and one seven-shilling piece in gold, gold coins being at that period uncommonly scarce. Considerable stress was laid by the counsel for the prosecution upon the coincidence as to the two smaller gold coins stolen and those found upon the prisoners, though, on account of the smallness of the number, it was clearly of little importance; but the case was conclusive upon the general evidence, as the prisoners had been seen lurking about the house on the evening prior to the murder, and one of them was seen shortly before the murder

sitting in the kitchen with one of the murdered women, and three of the prisoners were seen leaving the premises together not long afterwards with a bundle.

II. Independently of the direct effect of a concurrence of witnesses or of circumstances, the security of our judgements is further increased from the considerations, that in proportion to the number of such witnesses or circumstances confederacy is rendered more difficult, and that increased opportunities and facilities are afforded of contradicting some or all of the alleged facts if they be not true. To preserve consistency in a work even professedly of fiction, where all the writer's art and attention are perpetually exerted to avoid the smallest appearance of discrepancy, is an undertaking of no common difficulty; and it is obvious that the difficulty must be incomparably greater of preserving coherency and order in a fabrication which must be supported by the confederacy of several persons, where, since by the hypothesis the congruity results from artifice, the slightest variation in any of the minute circumstances of the transaction or of its concomitants, may lead to detection and exposure. On the other hand, if the statements of the witnesses are based

upon realities, the more rigorously they are sifted the more satisfactory will be the general result, from the development of minute, indirect, and unexpected coincidences in the attendant minor particulars of the main event. It was happily remarked by Dr. Paley, that “ the *undesignedness* of the agreements (which undesignedness is gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist, to the places in which those circumstances occur, and the circuitous references by which they are traced out) demonstrates that they have not been produced by meditation or by any fraudulent contrivance. But coincidences from which these causes are excluded, and which are too numerous and close to be accounted for by accidental concurrences of fiction, must necessarily have truth for their foundation*.” The same learned writer also justly remarks, that “ no advertency is sufficient to guard against slips and contradictions when circumstances are multiplied†.” Hence it is observed in courts of justice, that witnesses who come to tell a concerted story are always

* Paley’s View of the Evidences of Christianity, part ii. ch. vii.

† Horæ Paulinæ, chap. i.

reluctant to enter into particulars, and perpetually resort to shifts and evasions to gain time for deliberation and arrangement before they reply directly to a course of examination likely to bring discredit upon their testimony. It must nevertheless be admitted that there have been extraordinary cases of false charges, most artfully supported by a connected train of feigned circumstances. Of this nature was the celebrated case of Mary Squires and Susannah Wells, who were tried at the Old Bailey Sessions in February, 1753, for robbing and afterwards confining Elizabeth Canning in a house at Enfield for twenty-nine days without sustenance, except a quatern loaf and a pitcher of water. Upon this weighty charge both the prisoners were convicted, Squires as principal and Wells as accessory* ; and the former narrowly escaped the infliction of the last penalty of the law. So great was the popular prejudice against the prisoners, that several benevolent individuals who exerted themselves in order to save their lives incurred great public odium†. It was nevertheless afterwards clearly established that this accusation was a fabrication entirely destitute of foundation ; and

* State Trials, vol. xix. p. 275.

† Sketches of Imposture, Deception, and Credulity, p. 147.

Canning was afterwards convicted of perjury and sentenced to be transported. Upon the trial of Canning, thirty-eight witnesses, most of them unconnected with each other, spoke to the identity of Squires, and proved a circumstantial *alibi**. It was never discovered where Canning was during the period of her alleged confinement; nor was any evidence adduced as to the possibility of sustaining life so long upon so small a quantity of food†. It is highly probable that the desire of preserving the reputation of female propriety from deserved reproach was the impelling motive in this extraordinary case, and led the complainant to the extreme of turpitude in order to escape the loss of character.

But considering the circumstances of the class of persons most frequently subjected to accusation for alleged crime,—deprived of personal freedom, often friendless, and still more frequently destitute of pecuniary resources and professional aid,—their imperfect means of knowing all the facts proposed to be proved, or the manner in which they are attempted to be connected,—the alleged facility of disproof is often more imaginary than real. Some of these

* State Trials, vol. xix. p. 275; and *ibid.*, p. 667.

† London Medical and Surgical Gazette, vol. viii. p. 36.

disadvantages have been diminished by the provisions of a recent Act of Parliament*, which gives to persons held to bail or committed to prison *a right* to require copies of the examinations of the witnesses upon whose evidence they have been held to bail or committed on payment of a moderate charge, and at the time of trial to inspect the depositions returned into Court. The argument founded on the means afforded of disproof may consequently now be urged with more of justice and effect than formerly, though even still a party charged with crime has no means of knowing any facts which may not have been brought forward prior to his commitment, or which may be discovered in the interval before trial; nor does the enactment extend to cases of commitment by the coroner†. There are moreover many cases which do not afford the alleged facility of disproof in any degree; where the supposed presumption of guilt is nothing more than a mistaken inference from facts which afford no warrant for the inference of guilt; in such circumstances to attempt disproof is to attempt to grapple with a shadow;

* Stat. 6 and 7 Will. IV., cap. 114, ss. 3 and 4.

† *Rex v. Greenacre*, *ut supra*.

to require it, to exact an impossibility*. Experience proves that though witnesses may be accurate and upright in their narration of circumstantial facts, the inferences from their testimony may be wholly erroneous; a source of fallacy from which direct evidence is generally though not always exempt.

It must be acknowledged moreover, that history and experience supply abundant evidence that it would be most erroneous in the abstract to decide a matter of fact by numbers, and still more so where the question is one of scientific opinion. So great is the difference between the powers and acquirements of individuals, that the judgement of one man often outweighs the combined opinion of many other men. Mr. Justice Buller, on the trial of Donellan, told the jury that "they had the very positive opinion of four or five gentlemen of the faculty that the deceased did die of poison, and on the other side what he really could not himself call more than the doubt of another." The individual witness alluded to was perhaps the first surgeon of his day, who having been asked whether in his judgement, from the appearances described by the gentlemen

* *Rex v. Looker*, and *Rex v. Thornton*, *ut supra*.

who had examined the body of Sir Theodosius Boughton, any inference could be drawn from thence that he died of poison, replied, "Certainly not; it does not give the least suspicion." Surely it cannot have been correct thus to have represented this answer as merely expressive of doubt, even if it were correct to estimate the judgement of such a witness merely as of the subtractive value of unity. Nor should it have been overlooked that one of the medical witnesses for the prosecution had previously been as positive that the deceased died from arsenic, as he was upon the trial that he had died from laurel-water. Mere difference of opinion is certainly not *per se* sufficient to warrant the rejection of a conclusion of guilt, nor ought the concurrence of opinion in men of high scientific attainment to be considered as unimportant: but the difference of opinion to induce distrust must be such, as upon candid, careful reflection involves the matter in reasonable doubt.

III. The preceding considerations imply the necessity of consistency and general harmony in the testimony of the different witnesses. All human events must necessarily form a coherent whole; and actual occurrences can never be mutually inconsistent. If one of two witnesses

depose that he saw an individual at London, and the other that he saw him at York at or near the same precise moment, the accounts are absolutely irreconcilable, and one or other of them must by design or by inadvertence be untrue. A diversity ought always to excite caution and a scrupulous regard to the capacity, situation, and disposition of the witnesses, and especially to the possibility of confusion from some mental emotion. Lord Clarendon relates, that in the alarm created by the Fire of London, so terrified were men with their own apprehensions, that the inhabitants of a whole street ran in a great tumult one way, upon the rumour that the French were marching at the other end of it*. The same noble historian has also given another anecdote relating to that great calamity, too instructive as applicable to this subject to be omitted. A servant of the Portuguese ambassador was seized by the populace and pulled about, and very ill-used, upon the accusation of a substantial citizen, who was ready to take his oath that he saw him put his hand in his pocket, and throw a fire-ball into a house, which immediately burst into flames. The foreigner, who

* *Life, and Continuation, etc.*, vol. iii. p. 91, Oxford ed., 1827.

could not speak English, heard these charges interpreted to him with amazement. Being asked, what it was that he pulled out of his pocket, and what it was he threw into the house, he answered, that he did not think he had put his hand into his pocket, but that he remembered very well that as he walked in the street he saw a piece of bread upon the ground, which he took up and laid upon a shelf in the next house, according to the custom of his country; which, observes a learned writer*, is so strong, that the King of Portugal himself would have acted with the same scrupulous regard to general œconomy. Upon searching the house, which was in view, the bread was found just within the door upon a board as described; and the house on fire was two doors beyond it, the citizen having erroneously concluded it to be the same; "which," says Lord Clarendon, "was very natural in the fright that all men were in†."

But *variations* in the relations by different persons of the same transaction or event, in respect of unimportant circumstances, are not

* Wooddesen's Lectures on the Laws of England, vol. iii. Lecture 53.

† Clarendon's Life and Continuation, vol. iii. p. 86.

necessarily indicative of fraud or falsehood, provided there be substantial agreement in other respects. True strength of mind consists in not allowing the judgement, when founded upon convincing evidence, to be disturbed because there are immaterial discrepancies which cannot be reconciled. When the vast inherent differences in individuals with respect to natural faculties and acquired habits of accurate observation, faithful recollection, and precise narration, and the important influence of intellectual and moral culture, are duly considered, it will not be thought surprising that entire agreement is seldom found amongst a number of witnesses as to all the collateral incidents of the same principal event. "I know not," says Dr. Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These circumstances are

studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud*.”

Instances of discrepancy as to the minor attendant circumstances of historical events are almost numberless. Lord Clarendon relates that the Marquis of Argyle was condemned to be hanged, and that the sentence was performed the same day†. Burnet, Woodrow, and Echard, writers of good authority who lived near the time, state that he was beheaded, though condemned to be hanged, and that the sentence was pronounced on Saturday and carried into effect on the Monday following‡. Charles the Second, after his flight from Worcester, has been variously stated to have embarked at Bright-helmstone§ and at New Shoreham||. Lord Clarendon states that the royal standard was erected about six o'clock of the evening of the 25th of August, “a very stormy and tempestuous

* Paley's *View of the Evidences of Christianity*, part iii. c. 1.

† Lord Clarendon's *Life and Continuation*, &c., vol. ii. 266.

‡ Paley's *Evidences*, part iii. ch. 1.

§ Lord Clarendon's *History of the Rebellion*, vol. vi. p. 541, Oxford, ed. 1826.

|| Lingard's *History of England*, vol. xi. ch. i.

day*." Other contemporary historians state that it was erected on the 22nd of August†. But such discrepancies never occasion a doubt as to the truth of the principal facts with which they are connected.

Still less are mere *omissions* to be considered as casting discredit upon testimony which stands in other respects unimpeached. Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed by, and the attention so riveted to, a particular fact, as to withdraw observation from concomitant circumstances; sometimes however they proceed from wilful suppression. It is a curious fact, that Grafton in his *Chronicles*, published in 1562, in writing the reign of King John, has made no mention of Magna Charta; but our surprise is diminished when it is remembered that he was printer to Queen Elizabeth; and he probably considered his silence complimentary to that arbitrary princess‡.

When these general and special reasons concur to warrant our faith in circumstantial evidence, it is then in its greatest strength and per-

* History of the Rebellion, vol. iii. p. 190.

† Rushworth's Historical Collections, vol. i. part 3. p. 783.

‡ Edinburgh Review, vol. liii. p. 5.

fection; but it is notwithstanding a humbling consideration, that, "even where there have been a number of concurrent and unconnected circumstances, which have appeared inexplicable upon any hypothesis but that of the accused being guilty, it has yet sometimes been made evident that he was innocent*."

SECTION 3.

CONCLUSION.

The rules of evidence are founded in man's nature, as an intellectual and a moral being; and they are the practical maxims of legal and philosophic experience, matured by a succession of wise men, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion. Such rules must of necessity be substantially the same in every civilized country; and the inviolable observance of them is indispensable to social security and happiness. "It is pleasing to remark," observed Sir William Jones, "the similarity or rather identity of those conclusions which pure unbiassed reason in all ages

* Observations on the Criminal Law of England, by Sir Samuel Romilly, p. 74.

and nations seldom fails to draw, in such judicial inquiries as are not fettered and manacled by positive institution*.”

The design of this Essay has been to investigate the foundations of our faith in circumstantial evidence, to ascertain its limits and its just moral effect, and to illustrate and confirm the reasonableness of the practical rules which are established in order to prevent the unauthorized assumption of facts, and to secure to relevant facts their proper weight. It has been maintained that the persuasion which circumstantial evidence produces, in the abstract, is inherently of a different and inferior nature from that conviction which is the necessary consequence of direct credible evidence ; that such evidence, although not invariably so, is often superior in proving power to the average strength of direct evidence ; and that under the qualifications which have been stated, it affords a secure ground for the most important judgements in cases where direct evidence is not to be obtained.

It must however be conceded, that “ with the wisest laws, and with the most perfect administration of them, the innocent may sometimes be

* Sir William Jones's Works, vol. viii. p. 445, London, 8vo. ed. 1807.

doomed to suffer the fate of the guilty; for it were vain to hope that from any human institution all error can be excluded*." But certainty has not always been attained even in those sciences which admit of demonstration; and still less ought unfailing assurance to be expected in investigations of moral and contingent truth. Nevertheless, these considerations ought not to produce unreasonable and indiscriminate scepticism: the legitimate consequence of such reflections is to inspire a salutary caution in the reception and estimate of circumstantial evidence, and to render the legislator especially cautious how he authorizes, and the magistrate how he inflicts, punishment of a nature which admits of no reversal or mitigation. The golden words of Bacon are most apposite in relation to this important subject: "If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties†." It is indispensable to the very existence of society that the magistrate should found many of his determinations upon circumstantial evidence. But the difficulty or chance of uncertainty is not

* Sir Samuel Romilly's *Observations on the Criminal Law of England*, p. 74.

† Of the *Advancement of Learning*, book i.

greater in such cases, than when the maxims of evidence and judgement are applied to other important subjects of philosophical and judicial inquiry. The line has never been defined which separates unsoundness of mind from malignity of heart ; no chart has marked every sunken rock ; and even the indications of the needle are liable to disturbing agencies, and cannot always save the mariner from shipwreck. Infallibility belongs not to man ; and his strongest degree of moral assurance must ever be accompanied by the danger of mistake : but after just effect has been given to sound practical rules of evidence, there will remain no other source of uncertainty or fallacy than that general possibility of error, from which no conclusion of the human judgement, in relation to questions of contingent truth, can be exempt.

APPENDIX.

Page 64.

A SENSE of injury and long-cherished feelings of resentment may ultimately induce a state of mind independent of self-restraint, and render their victim the sport of ungovernable impulses of passion*. But the distinction is evident and just between such actions as are the consequences of a voluntary abdication of moral control, and actions committed under the overmastering power of a delusion of the imagination, which, though groundless, operates upon the mind with all the force of reality and necessity†. Facts of this kind occasionally present themselves which are of a nature totally to perplex and baffle the understanding. The following interesting cases on this head are not generally known.

Thomas Milward Oliver was tried at the Stafford summer assizes, 1797, before Mr. Baron Perryn, for the murder of Mr. John Wood. The prisoner was a surgeon and apothecary, and attended in his professional character the family of the deceased for several years,

* *Rex v. Earl Ferrers*, State Trials, vol. xix. p. 885; *Rex v. Bellingham*, Celebrated Trials, vol. vi. p. 102; and Report taken in short-hand by Mr. Fraser.

† *Rex v. Hadfield*, State Trials, vol. xxvii. p. 1281; Martin's case, *ut supra*; *Rex v. Offord*, Carrington and Payne's Reports, vol. v. p. 168; *Regina v. John Goode*, Queen's Bench, 18th November 1837.

in consequence of which an intimacy took place, and the prisoner wished to pay his addresses to one of Mr. Wood's daughters. This proposal being disagreeable to Mr. Wood, he requested the prisoner to discontinue his visits ; and, with a view to put an end to all intercourse, sent to him for his bill. Five days before the fatal event, the prisoner borrowed a pair of pistols and bullet-moulds. On the morning of the 27th of January the prisoner called at the deceased's house, and, after reproaching him with having made his life miserable by at first giving him encouragement, he produced his bill, and instantly discharged one of the pistols at the deceased, who died three days afterwards. He then presented the other pistol at the deceased's foreman, who however disarmed him. In a short time the prisoner became collected, and expressed regret for the distress he had brought upon the deceased's family and himself. It was proved that the prisoner was a remarkably mild and humane man, that several members of his family had been insane, and that latterly there had been something odd and eccentric in his conduct ; and two physicians (who, however, did not see him till after the event,) stated that he had an uncommon gloominess of countenance, and that peculiar look about the eyes which is considered as a mark of insanity ; and that when Miss Wood was mentioned he became agitated, his countenance convulsed, and his eyes rolled, which was followed by an inflexibility of muscle and a peculiar drawing and biting of the lips. But there was no proof of insanity at the time the act was committed ; on the contrary, the prisoner was confidentially trusted in his profession, and passed in society as a person of sound mind. The case was therefore

considered as not distinguishable from the ordinary case of an act committed under the operation of motives of resentment consequent upon disappointed wishes and a sense of injury, real or supposed. The prisoner was convicted and executed*.

At the Warwick spring assizes, 1809, Rebecca Hodges was tried before Mr. Justice Bayley for shooting at Samuel Birch with intent to murder him. The prisoner had lived as a servant in the prosecutor's family for about nine months, but was discharged in consequence of having absented herself without leave for two days. About seven years after her dismissal, the prisoner, attired in man's apparel, secreted herself in an outhouse; and, when she supposed the family were gone to bed, she looked under the shutter of the kitchen window, and perceiving Mr. Birch asleep in a chair before the fire, she lifted the latch, and slowly approaching him, discharged a pistol-ball at his head, and dangerously wounded him. Three hours afterwards the prisoner was apprehended by a watchman wandering about the streets of the neighbouring town of Birmingham with a loaded pistol under her arm. The prisoner had purchased the pistols and man's attire about twelve months before the commission of the act: and she stated that from the time of her discharge she had vowed to be revenged, that she liked Mr. Birch very much, that she did not make the attempt sooner because she wanted courage, and that she had been near Mr. Birch several times as he was coming from market, but that he did not

* Report of the Trial; and see a reference to this case in the *State Trials*, vol. xxvii. p. 1328. See also some strictures on this case by Dr. John Johnstone, in a tract entitled *Medical Jurisprudence*.

know her, as she had man's clothes on, and a great-coat over them. Mr. Birch and his housekeeper had never perceived in the prisoner any symptoms of insanity; but a gentleman with whom she lived three years, and several other persons, stated that they believed her not to be of right mind, and deposed to several acts of eccentricity and extravagance of conduct. The prisoner was acquitted on the score of insanity, and remained in Warwick jail until the 25th of November 1816, when she was removed to the New St. Bethlehem Hospital, London, from which she was discharged as of sane mind on the 25th of August 1817. In the night of the 11th of December following the prisoner set fire to and destroyed the prosecutor's ricks, under circumstances which indicated much cunning. For this offence the prisoner was tried at the Warwick Lent assizes for 1818*, before Mr. Baron Garrow. The keeper of Warwick jail and the medical officer of the hospital both stated, that during the whole of her long confinement she had exhibited no signs of insanity, and that they considered her to be in full possession of her faculties. The prisoner's defence presented a strange incoherent medley of profanity and indecency: she was convicted, but not executed; and it is probable that the verdict of the jury on the first trial was correct.

Page 128.

The following case is another instance of the difficulty of identifying articles of dress by the fabric and pattern. Tamor Bate was tried at the Warwick autumn assizes, 1809, before Mr. Justice Le Blanc, for the murder of her infant child; and about a fortnight after the time of her

* *Ante*, p. 127.

supposed delivery, the body of a newly-born female child was found in a pond about a hundred yards from her master's house, dressed in a shirt and cap, with its throat cut and a brick tied round its body. A stay or tie which was pinned to the cap was made of spotted muslin, and it was stated by a female witness to be of the same stuff as a cap found in the prisoner's box; but an experienced mercer declared that the two pieces were not only unlike in pattern, but different in quality. The prisoner was acquitted.

Page 153.

In a late case in the Court of King's Bench, the defendant in an action of ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him, (none of them being in evidence for any other purpose of the cause,) and he stated that he believed them to be his. On the following day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having previous to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court. On the trial Mr. Justice Vaughan rejected the evidence. Upon a motion for a new trial, on the ground of the improper rejection of the evidence, the Judges of the Court of King's Bench were

equally divided in opinion*. Comparison of handwriting appears to be generally admitted in the Courts of Law in the United States of America†.

Page 155.

It is not the practice of Courts of Common Law, in cases of controverted writing, to reject the artificial aid of glasses and lamps.

Page 242.

The case of William Booth, who was tried at the Warwick spring assizes, 1808, before Mr. Baron Wood, upon an indictment for the murder of John Booth, his brother, was a very extraordinary instance of the difficulty of pronouncing upon the existence of the *corpus delicti*. The deceased lived with his father, and overlooked his farm. The prisoner, who was on ill terms with the deceased, and lived about twenty miles from his father's house, visited his father on the 18th of February. On the following day the deceased was found dead in the stable, not far from a vicious mare, and her traces were upon his arms and shoulders; two other horses were in the stable, but they had their traces on. Suspicion fell upon the prisoner; and the question was whether he had killed the deceased with a spade, or whether he had been kicked by the mare. The spade was bloody, but had inadvertently been used in cleaning the stable by a boy; and the nature of the cause of death could be determined only by the character of the wounds. There were two straight incised wounds on

* Doe dem. Mudd, v. Suckermore, Adolphus and Ellis vol. v. p. 703.

† See Avery's case, *ut supra*, p. 278.

the left side of the head, one about five, and the other about two inches long, which had apparently been inflicted by an obtuse instrument. On the right side of the head there were three irregular wounds, (two of them about four inches in length,) partaking of the appearance both of lacerated and incised wounds. There was also a wound on the back part of the head, about two inches and a half long. There was no tumefaction around any of the wounds, the integuments adhering firmly to the bone; and, except where the wounds were inflicted, the fracture of the skull was general throughout the right side, and it extended along the back of the head toward the left side, and a small part of the temporal bone came away. The deceased was found with his hat on, which was bruised but not cut, and there were no wounds on any other part of the body. Two surgeons expressed a strong opinion that the wounds could not have been inflicted by kicks from a horse; grounding that opinion principally on the distinctness of the wounds, the absence of contusion, the firm adherence of the integuments, the straight lateral direction and similarity of the wounds; whereas the deceased would have fallen from the first blow if he had been standing, and if lying down the wounds would have been perpendicular; and they moreover expressed a positive opinion that the wounds could not have been inflicted if the hat had been on the deceased's head without cutting the hat, and that he could not have put on his hat after receiving any of the wounds. The learned Judge, however, stated that he remembered a trial at the Old Bailey, where it had been proved that a cut and a fracture had been received, without having cut

the hat ; and evidence was adduced of the infliction of a similar wound by a kick without cutting the hat*. The prisoner was acquitted ; but he was shortly afterwards executed for an offence of a different description.

In the case of Joseph Downing, which has been mentioned in a former page†, it was also impossible to pronounce with any certainty that the *corpus delicti* existed ; as there was nothing in the nature of the wound to show that it had not been inflicted by a kick from the deceased's horse, which was indeed extremely probable ; and there was no apparent motive to induce the prisoner to commit murder, as he was interested in the continuance of the deceased's life. The deceased's hat was not cut ; from which circumstance it was considered to be probable that it was not on his head when the wound was inflicted‡, and that the case was one of accident.

* Printed Report of the Trial.

† *Ante*, p. 179.

‡ Report of the Trial, *ut supra*.

ERRATA.

Page 92, line 11, *for any read my*.

— 156, *for Alexander in the note read Archibald*.

— 198, line 19, *for who read which*.

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